

Catholic University Law Review

Volume 19 | Issue 4

Article 3

1970

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Recommended Citation

Charles M. Schiesser & Daniel H. Benson, *Modern Military Justice*, 19 Cath. U. L. Rev. 489 (1970).
Available at: <https://scholarship.law.edu/lawreview/vol19/iss4/3>

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Modern Military Justice

CHARLES M. SCHIESSER*
and DANIEL H. BENSON**

No less an authority than the venerable John Henry Wigmore once formulated an apologia in 1921 for the rough and ready military justice of World War I in the following language:

The military system can say this for itself: It *knows what it wants*; and it systematically *goes in and gets it*.

Civilian criminal justice does not even know what it wants; much less does it resolutely go in and get anything.

Military justice wants *discipline*—that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men. The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring in a particular case, what was the regulation or order, and whether it was in fact obeyed. But its object is discipline.

The civilian penal system, on the other hand has not even formulated what it wants. Some still say Retribution to the individual, some say Prevention of other wrongdoers; some say not Retribution, but Reformation of the individual; and most ignore a fundamental element, viz., the public reaffirmation of the community's principles of right and wrong.¹

Surprisingly enough, the principal opponent of the system of military

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1. Wigmore, *Lessons from Military Justice*, 4 J. AM. JUD. Soc'y 151 (1921).

justice that existed at that time was a Brigadier General in the United States Army, Samuel T. Ansell.² Thus, as is so often true, stereotype characters do not really exist in fact. Instead of what one would expect, one finds the brilliant, independent, civilian legal scholar³ defending what was then a harsh, summary military justice system, while a member of the Establishment, an Army Brigadier General, jeopardized and ultimately lost his career⁴ by advocating sweeping, but unacceptable, reforms.

The point is that generalizations are highly misleading and quite frequently inaccurate. It is important to note this at the outset, for it is desired that what is said in this article concerning military justice be taken at face value; that it be understood neither as unreasoned criticism of what is now a sophisticated system of justice, nor as an abject acceptance of those portions of that system that need change.

In some respects perhaps we can draw an analogy between criticism of military justice from within and the writings of a group called the Underground Church in contemporary theology. Internal critics accept the Establishment in all of its forms. They expect change only through lawful and recognized modes, but they find things in the system that are not to their liking and that need change. These critics advocate "surgical renewal" from within the Establishment, much as the Underground Church advocates revolutionary reform from the "basement of the structure".⁵ Internal critics value highly the military justice structure, but they see the need for further improvements.

This attitude, we believe, is appropriate for our times. As Melvin Belli has observed, "Today's lawyer who thinks antiquity in law is its essential ingredient, who feels that law is and must forever-more remain a laggard . . . has not read the opinions of courts of last resort during the last ten years."⁶ Belli goes on to assert that, as the late Bishop-lawyer-theologian James A. Pike said, law is "where the action is."⁷ We are convinced that this is true of military, as well as civilian, law.

Pollock and Maitland noted: "Such is the unity of all history that anyone

2. See Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967).

3. Wigmore was not entirely a civilian; he was a reserve colonel in the Judge Advocate General's Department. His comments made in 1919-20 are being used today in support of the military system of trial.

4. General Ansell was reduced from temporary Brigadier General to permanent Lieutenant Colonel on March 4, 1919. *Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Senate Comm. on Military Affairs*, 66th Cong., 1st Sess. 160-64 (1919).

5. See THE UNDERGROUND CHURCH viii (M. Boyd ed. 1960).

6. 1 M. BELLI, THE LAW REVOLT 3-4 (1968).

7. *Id.* at 21.

who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.⁸ Certainly we feel this, in attempting to tell a piece of the story of modern military justice. Obviously the reader should be aware of the origins of American military law, and particularly the fact that it began as a copy of the British system, which itself was a copy of the early Roman military law.⁹ The Articles of War functioned well at first in a small professional Army. But the needs of the Nation to defend itself increased, and with the increase the Army was changed into a predominantly civilian military force containing scientists, technologists, and specialists. There was no corresponding change in military law, however, and the proper administration of military justice floundered.¹⁰ At the end of World War I, military law was subjected to studies aimed at reform.¹¹ This also led to the now famous internal dispute in the Army between General Crowder, who resisted change and General Ansell, who sought it. With the victory of General Crowder, and the vanquishing of General Ansell, the hope for modernizing the Articles of War faded, and complaints against the system diminished with the size of the armed forces.¹² The complaints arose anew after World War II, but this time post-war criticism was more intense, and support for reform more forceful. Studies were conducted inside¹³ and outside of the Army,¹⁴ and they culminated in the Uniform Code of Military Justice.¹⁵ This new Code muted criticism, but it did not end it.¹⁶ Today criticism is increasing,¹⁷ and new reformers call for change.

8. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 1 (4th ed. 1959).

9. G. DAVIS, *MILITARY LAW* 1-12 (1898); W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 15-24 (2d ed. 1920); Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 *YALE L.J.* 52 (1919); Morgan, *The Background of the Uniform Code of Military Justice*, 6 *VAND. L. REV.* 169 (1953).

10. Brown, *supra* note 2; Sutherland, *The Constitution, the Civilian, and Military Justice*, 35 *ST. JOHN'S L. REV.* 215-16 (1961).

11. *Hearings on S. 64*, *supra* note 4; Morgan, *Military Justice*, reprinted in *Hearings on S. 64*, *supra* note 4, at 1388-95 (1919); Ansell, *Military Justice*, 5 *CORNELL L. Q.* 1 (1919); Ansell, *Some Reforms in our System of Military Justice*, 32 *YALE L.J.* 146 (1922).

12. Brown, *supra* note 2.

13. S. Doc. No. 196, 79th Cong., 2d Sess. 1-23 (1946); *Report of the War Department Advisory Committee on Military Justice*, 14 *J.B.A.D.C.* 69 (1947).

14. *Hearings before a Subcomm. of the House Armed Services Comm. on H.R. 2498*, 81st Cong., 1st Sess., (1949); *Hearings before a Subcommittee of the Senate Armed Services Comm. on S. 857 and H.R. 4080*, 81st Cong., 1st Sess., (1949).

15. 10 U.S.C. §§ 801-940 (1964) [hereinafter cited as UCMJ].

16. See Keeffe, *JAG Justice in Korea*, 6 *CATHOLIC U. L. REV.* 1 (1956).

17. See *O'Callahan v. Parker*, 395 U.S. 258 (1969); Glasser, *Justice and Captain Levy*, 12 *COLUM. F.* 46 (1969); Sherman, *The Civilianization of Military Law*, 22 *MAINE L. REV.* 3 (1970). See also West, *The Command Domination of the Military Judicial Process*, Aug. 10, 1969 (unpublished thesis in the George Washington University Law School, Washington, D.C.) which recommends that military justice be completely removed from the control of military commanders.

What follows are some observations on Military Justice which we offer as working military practitioners in the hope that, in some small way, we may assist in the continuing advance of military law.

Contemporary Background

Military commentators¹⁸ have praised the many significant advances made over the past few years in military justice. Generally they have treated both the problems that exist and the services themselves in a general sense, as if the armed forces constitute one composite unit, where changes acceptable at the highest levels automatically become acceptable to field units. Moreover, military critics¹⁹ have approached both the problems and the services in the same manner; thus an alleged arbitrary application of military criminal law at one post is used to support a claim that all military law is arbitrary.²⁰ Both positions are, we submit, erroneous.

Military justice is, in fact, regarded by the Department of Defense, its subordinate departments, and most field commanders as a system designed to provide fair and impartial trials for individuals accused of criminal offenses. A natural incidental effect of such a system will be increased discipline through the exoneration of the innocent and the punishment of the guilty. However, due to the enormous size of the armed forces, a few exceptions may exist from time to time. An occasional field commander, generally through mis-advice or misunderstanding, will still view military justice solely as an instrument of discipline. Of course, this view is supported by Wigmore's comments in 1921, but it ignores the fact that military justice is not as rudimentary as it was at that time. Certainly it is true that the armed services generally emphasize the many good points about military justice, and their representatives attempt to avoid discussing the few deficiencies that exist. We feel this is largely a natural reflex action caused by the military's critics who emphasize only deficiencies and sometimes ignore the many recent advances made in military law. But neither the military's use of myopic vision when focusing on defects, nor the

18. See, e.g., Birnbaum, *Rights of the Convicted*, 4 TRIAL, Feb.-Mar. 1968, at 14; Hodson, *Is there Justice in the Military?*, 15 ARMY RESERVE, Nov.-Dec. 1969, at 22-24; O'Malley, *Mapp, Miranda and the Accused*, 4 TRIAL, Feb.-Mar. 1968, at 10; Westerman, *Court of Military Review*, 24 ARMY DIGEST, Oct. 1969, at 11.

19. See Glasser and West, *supra* note 17.

20. E.g., it was recently stated: "None of the travesties of justice perpetuated under the UCMJ is really very surprising for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, *supra* note 17 at 49. This statement is based primarily on one case, the court-martial of Captain Howard B. Levy. See *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); *United States v. Levy*, 39 C.M.R. 672 (1968), *pet. denied*, 18 U.S.C.M.A. 627, 40 C.M.R. — (1969)

critic's blindness when advances in military law are discussed, is a satisfactory basis for study. In the long run, the patient's health will be more improved by proper diagnosis and treatment, than by either a refusal to admit the illness, or a desire for the patient's demise.

It is appropriate to being, we believe, by noting the possible confusion which arise when one compares the Department of Defense's enthusiastic endorsement of the recent amendments to the Code brought about by the Military Justice Act of 1968,²¹ with the Department's stated attitude toward those amendments prior to their enactment. Field commanders, and particularly their legal advisors, were aware that early in 1966 military spokesmen²² had opposed: (1) a mandatory requirement that a military judge be appointed to any special court-martial authorized to adjudge a punitive discharge;²³ (2) the right of an accused to be tried before a military judge alone without the consent of the convening authority who ordered the trial;²⁴ (3) the establishment of a field, or trial, judiciary by law in all of the armed forces;²⁵ (4) the appointment of civilian chief judges to intermediate appellate courts;²⁶ (5) prohibitions against the preparation by appellate judges of efficiency reports on other judges;²⁷ (6) prohibitions against the consideration of an officer's performance as defense counsel in the preparation of efficiency reports;²⁸ (7) abolition of the summary court-martial;²⁹ and (8) most of the provisions in the bills which would extend

21. 10 U.S.C. §§ 801-936 (Supp. IV, 1969), *amending*, 10 U.S.C. §§ 801-936 (1964).

22. *See Joint Hearings on S. 745-762 and S. 2906-2907 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary and a Special Subcomm. of the Comm. on Armed Services*, 89th Cong., 2d Sess., pts. 1-3 (1966) [hereinafter cited as *1966 Hearings*].

23. "We are opposed to the provision that a special court-martial cannot adjudge a bad conduct discharge unless a law officer [now a military judge] has been detailed and has been present at the trial." *Id.* at 17.

24. "The Department of Defense believes that waiver of a trial before the court members should be conditioned on the consent of the Government, and the authority who convenes the court is the logical person to determine whether this consent should be granted." *Id.* at 17.

25. "We are opposed to the features of S. 745 which would require the establishment of a field, or trial judiciary, and would specify by law details as to the assignment and duties of the law officer." *Id.* at 21.

26. "The Department of Defense is not persuaded that the administration of military justice in the Armed Forces would be improved if senior military officers . . . were replaced by civilian employees." *Id.* at 22.

27. "The Department of Defense also opposes enactment of the related bill, S. 755, which would prohibit the preparation of efficiency or fitness reports by members of boards of review with respect to any other member of the same or another board of review." *Id.*

28. "[W]e opposed that portion of S. 749 which would prevent the performance of an officer as defense counsel from being taken into consideration in preparing efficiency or fitness reports." *Id.*

29. "The Department of Defense now opposes S. 759, which would abolish the summary court-martial." *Id.* at 24.

greater protection to service members being processed for administrative separation from the armed forces by military boards of officers.³⁰

Regardless of the merit of the bills involved, field commanders and their staffs probably believed that the Department of Defense's 1966 opposition to the amendments was the permanent official position of the Department. These officials were intimately aware of the long and painful legislative history of the improvements, and they knew that the Department had never wholeheartedly endorsed the improvements prior to their enactment.

It is partly this dichotomy between past and recent public pronouncements of the Department which has affected military justice at the unit level. A few field commanders and their staffs were convinced that the 1966 position of the Department opposing change was the true attitude of the Department which should be exemplified in the day-to-day operations of military justice at the unit level. Thus implementation of the Military Justice Act varied from command to command, and where there was an unfavorable attitude by local officials towards the changes, there was discontent among the ordinary servicemen, the consumers of military justice. The attitude of the individual serviceman is important, and we submit that the consumer perspective, suggested by Edmond Cahn,³¹ is the proper one in this instance if we are to understand adequately the continuing dissatisfaction of the ordinary serviceman with military justice. As Cahn pointed out, it is traditional for jurists of the official perspective to justify the legal system in terms of averages, wholesale statistics, and overall performances; but seen in the consumer perspective, these defenses are dubious at best:

If an innocent man is sent to prison or the electric chair, there is something not quite adequate about assuring him (or his widow) that miscarriages do not happen very often; the man may have a stubborn feeling that he is entitled to justice in his particular case.³²

Accordingly, we must be aware that the Department of Defense's praise of the changes brought about by the Military Justice Act of 1968 after its enactment is only now overcoming its prior official position in opposition. We must also realize that the 1966 hearings remain available as reading materials for field commanders and their legal advisors. Thus many military officials may be inclined to believe that the current praise is merely a commendable acceptance by the Department of unwanted changes that are now the law.

With this background, we must go on and attempt to penetrate the

30. *Id.* at 355-401.

31. *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963).

32. *Id.* at 16.

military system of trial. We must examine the "sweeping changes in the Uniform Code of Military Justice effected by the Military Justice Act of 1968,"³³ and the position of power of the commander who brings cases to trial in the first instance.³⁴

The Military Justice Act of 1968

The Military Justice Act of 1968³⁵ created trial and appellate military judges,³⁶ modernized military trial procedure,³⁷ increased military accused's rights to legal counsel,³⁸ provided a system of post-trial "bail",³⁹ strengthened the ban on illegal command influence,⁴⁰ limited the use of the summary court-martial,⁴¹ and strengthened post-conviction remedies.⁴² The following discussion will set forth in more detail some of the principal changes that were made from prior law, and will attempt to assess the modern system of military justice.

Military Trial Judges

It has been stated that one of the primary purposes of the Military Justice Act of 1968 was to make court-martial procedures more like those followed in United States district courts, and that the military judge "has been given functions and powers more closely allied to those of a federal district judge, except that in a trial with court members, the members still determine the sentence."⁴³ This is not the only significant difference. There are others, and these other differences are so important that it is not realistic to compare a military judge with a federal district judge.

For example, a federal district judge may not be overruled by a layman on an issue of law in dismissing a count of an indictment, yet a military judge may be so overruled by the military commander who convened the court-martial (usually a layman with no legal training) on an issue of law. Paragraph 67f, *Manual For Courts-Martial*, 1969 (Revised edition), provides in pertinent part:

33. Mounts & Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470 (1969).

34. See text section, *The Convening Authority: Locus of Power*, *infra*.

35. 10 U.S.C. § 801-936 (Supp. IV, 1969), amending 10 U.S.C. §§ 801-936 (1964).

36. *Id.* §§ 826, 866 (Supp. IV, 1969).

37. *Id.* § 839(a).

38. *Id.* §§ 819, 827(c).

39. *Id.* § 857(d).

40. *Id.* § 837.

41. *Id.* § 820.

42. *Id.* §§ 869, 873.

43. Westerman, *Court of Military Review*, 24 ARMY DIGEST, Oct. 1969, at 11. See also S. REP. NO. 1601, 90th Cong., 2d Sess. 3 (1968).

If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

The same paragraph further provides:

To the extent that the matter in disagreement relates solely to a question of law, as, for example, whether the charges allege an offense cognizable by a court-martial, the military judge or the president of a special court-martial without a military judge will accede to the view of the convening authority.

This means that the convening authority, not the military judge, has the power finally to determine at the trial level questions of law related to the dismissing of any specification. The Manual provides that where there is a dispute concerning a question of fact, the convening authority may send the case back to the court-martial for reconsideration, but in that situation the military judge will exercise his "discretion" upon reconsideration of the issue.⁴⁴ In matters of this kind, the military judge is on the same level as the lay president of a special court-martial sitting without a military judge.

In fact, the military judge is not completely a judge, as that term is properly understood. However, he does purport to act like a judge in a criminal court; he decides issues of law and fact in criminal cases (subject to being overruled by the convening authority as we noted, *supra*); he announces findings of "guilty" or "not guilty", and he imposes sentences when sitting alone (again subject to being overruled by the convening authority).

Because of his unique status, there is no precise counterpart of the military judge in any other segment of our Government. But he is perhaps most nearly analogous to a federal hearing examiner.⁴⁵ Even this analogy is not exact, however, and breaks down at several points. Even so, it may be instructive to compare the two positions in order to highlight the present true status of a military judge.

A federal hearing examiner's independence is significantly more secure than that of a military judge. The Administrative Procedure Act⁴⁶ contains specific provisions establishing true independence for the examiners who hear administrative cases, and the Supreme Court has noted that enhancement of the status and functions of federal hearing examiners was one of the important purposes of the movement for administrative reform that

44. ¶ 67f MANUAL FOR COURTS-MARTIAL, 1969 (Revised edition) [hereinafter cited as MCM, 1969 (Rev.)]. See *United States v. Boehm*, 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968). Compare this military procedure with 18 U.S.C. 3731 (Supp. IV, 1969) regarding some of the Government's appeal rights within the federal system.

45. See 5 U.S.C. § 3105 (Supp. IV, 1969).

46. 5 U.S.C. 500-59 (1964).

led to enactment of the Administrative Procedure Act.⁴⁷ Examiners, for example, are removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission after opportunity for a hearing, and upon the record of such hearing.⁴⁸ Although this does not amount to a lifetime position,⁴⁹ it gives a federal hearing examiner far more independence than that enjoyed by a military judge, who is subject to reassignment by his Judge Advocate General. Further federal law requires assignment of examiners to cases in rotation as far as practicable, and specifically prohibits performance by examiners of any duties inconsistent with their duties and responsibilities as examiners.⁵⁰

As a House committee said: "The requirement of assignment of examiners 'in rotation' prevents an agency from disfavoring an examiner by rendering him inactive, although examiners may be permitted to specialize and be assigned mainly to cases for which they have so qualified."⁵¹ There is nothing to prevent a particular Judge Advocate General from "disfavoring" a military judge by "rendering him inactive" as a judge; no hearing is required, and no provisions of law exist to protect the military judge.⁵² Indeed, a "normal reassignment" removing him from judicial duties, could come in response to judicial acts which do not satisfactorily correspond to the predominant philosophy within the armed forces.⁵³

But even if the military judge lacks significant statutory protections extended by federal statutes to his brother, the federal hearing examiner, it is still true that his real functions and powers closely resemble those of the hearing examiner. Although he can not be equated to a federal hearing examiner (and we do not so equate him), he is much closer to that position than he is to the position of a federal district judge.

Perhaps it is appropriate at this point to state specifically that in making this comparison, we do not seek to take from military judges any prestige or status to which they are actually entitled. Nor do we mean to imply in any way that there is something less important about being a federal hearing examiner than being a federal district judge. The functions, status, and duties of these three positions differ significantly, and it can not be said

47. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

48. *See* 5 U.S.C. § 7521 (Supp. IV, 1969).

49. *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

50. 5 U.S.C. § 3105 (Supp. IV, 1969).

51. Doc. No. 248, 79th Cong., 2d Sess. 280 (1946).

52. *See In re Taylor*, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961) where the Court of Military Appeals refused to hear an appeal from the petitioner's decertification as a law officer by his Judge Advocate General.

53. Military judges in the Army are under the assignment authority of The Judge Advocate General of the Army.

that one is necessarily "better" or "worse" than the others. They are different. But there has been such widespread indiscriminating comparison of military judges with federal district judges,⁵⁴ that we desire to ask whether the comparison is valid. We obviously feel that it is not, but we do not want to be understood as opposed to the military judge concept as such.

We think that the advances made by the military judge concept in the Military Justice Act of 1968 are highly commendable, and the concept of the military judge is a major step forward for military justice. Our concern is that progress not stop with what we have now, since it is not enough; much more must be done to give military judges the true independence and powers that they need to function with real effectiveness in criminal trials. It is our purpose merely to show that the military judge is, what he is not, and what he could become. In doing this, it is necessary to clear away general expressions of what the position entails, and look at the facts. The reasons why we say the military judge is more like a federal hearing examiner than a federal district judge are as follows: the military judge, like the hearing examiner, can administer oaths,⁵⁵ rule on offers of proof,⁵⁶ authorize the taking of depositions,⁵⁷ receive relevant evidence,⁵⁸ regulate the course of the proceedings,⁵⁹ hold conferences for the settlement or simplification of the issues,⁶⁰ dispose of procedural requests,⁶¹ and make or recommend decisions concerning the case in hearing.⁶² But also like a hearing examiner, and quite unlike a federal district judge, a military judge actually makes what amounts to only an initial determination of the major issues before

54. "[O]ur aim [is] to assimilate the status of the law officer, wherever possible, to that of a civilian judge of the Federal system." *United States v. Biesak*, 3 U.S.C.M.A. 714, 722, 14 C.M.R. 132, 140 (1954). See Cutler, *The Right and Duty of the Law Officer to Comment on the Evidence*, 35 MIL. L. REV. 91 (1967); Grimm, *Criminal Justice in the Military Establishment*, 37 J. AM. JUD. SOC'Y 14, 19 (1953); Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39 (1959); O'Connell, *Independent Judiciary of the Army*, 5 BOSTON BAR J. 21, 22 (1961).

55. Compare 5 U.S.C. § 556(c)(1) (Supp. IV, 1969) with 10 U.S.C. §§ 842, 936 (b)(1) (Supp. IV, 1969).

56. Compare 5 U.S.C. § 556(c)(3) (Supp. IV, 1969) with 10 U.S.C. § 839 (Supp. IV, 1969).

57. Compare 5 U.S.C. § 556(c)(4) (Supp. IV, 1969) with 10 U.S.C. § 849(a) (Supp. IV, 1969).

58. Compare 5 U.S.C. § 556(c)(3) (Supp. IV, 1969) with 10 U.S.C. § 839(a) (Supp. IV, 1969).

59. Compare 5 U.S.C. § 556(c)(5) (Supp. IV, 1969) with 10 U.S.C. § 826(a) (Supp. IV, 1969).

60. Compare 5 U.S.C. § 556(c)(6) (Supp. IV, 1969) with 10 U.S.C. § 839(a) (Supp. IV, 1969).

61. Compare 5 U.S.C. § 556(c)(7) (Supp. IV, 1969) with 10 U.S.C. § 839(a) (Supp. IV, 1969).

62. Compare 5 U.S.C. § 556(c)(8) (Supp. IV, 1969) with 10 U.S.C. § 851 (Supp. IV, 1969).

him, not a final determination which is binding on the agency⁶³—in this case, the military department concerned. Thus, although a military judge *finds* an accused guilty, that finding is an initial determination only, and remains so until the convening authority approves it.⁶⁴ The same is true of the *sentence* imposed by a military judge; it is in actuality no sentence at all unless the convening authority approves it and orders it executed, and the convening authority may disapprove any part or all of it in his sole discretion.⁶⁵ The convening authority may suspend a sentence; the military judge has no power to do so.⁶⁶ A military judge, as such, can neither order an accused into confinement or release an accused from confinement, regardless of the results of a trial, findings of guilty, findings of not guilty, or imposition of a sentence.⁶⁷ A military judge has certain limited powers to hold a person in contempt of court, but even that finding and sentence, if any, has no legal effect whatsoever and can not be ordered executed except by the subsequent approval of the convening authority.⁶⁸ A military judge has no power to enforce the orders of his court;⁶⁹ enforcement of the orders of a military judge depends entirely upon discretionary action taken in response thereto by the military commanders concerned.⁷⁰ In this respect, even hearing examiners may actually have more authority to enforce their orders than military judges.

The crux of the matter has been well stated by Winthrop in his early treatise on military law:

Courts-martial of the United States, although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are thus not included among the 'inferior' courts which Congress 'may from time to time ordain and establish.' . . . Not belonging to the judicial branch of Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his au-

63. See 5 U.S.C. § 557 (Supp. IV, 1969); K. DAVIS, HANDBOOK ON ADMINISTRATIVE LAW 314-18 (1951).

64. See, Arts. 60 and 64, UCMJ, 10 U.S.C. §§ 860, 864 (1964).

65. See, Art. 64, UCMJ, 10 U.S.C. § 864 (1964).

66. See 10 U.S.C. § 871 (Supp. IV, 1969).

67. ¶ 21c, MCM, 1969 (Rev.).

68. 10 U.S.C. § 848 (1964); ¶ 118, MCM, 1969 (Rev.).

69. In fact, it is not "his" court, but it is the convening authority's court. As in the past, no court exists until a commander gives it life through a military order. See *United States v. Robinson*, 13 U.S.C.M.A. 674, 33 C.M.R. 206 (1963).

70. See art. 64, UCMJ, 10 U.S.C. § 864 (1964).

thorized military representatives.⁷¹

Winthrop went on to point out:

Thus indeed, strictly, a court-martial is not a *court* in the full sense of the term, or as the same is understood in the civil phraseology. It has no common law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage It is indeed a creature of *orders*, and except in so far as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person.⁷²

Winthrop has laid bare the heart of the problem. Just as a court-martial is still not a true court, so a military judge is still not a true judge. Just as a court-martial is called into existence by a military order, and by a similar order is dissolved when its purpose is accomplished, so a military judge is detailed to a court-martial by a military order, and it is only by such military order that a military judge has any power whatsoever to act. When the court-martial is dissolved by military order, the power and authority of the military judge to act is also dissolved, and is not revived until another court-martial convening order is issued by a military commander.⁷³

As we have stated, we regret that this is so. Military judges should be more like federal district judges, with most of the powers and authority of those judges relating to criminal proceedings. But since they are not, it is not helpful to proclaim that the law officer is now a federal judge: first, because that is not the truth, and second, because it is only when we honestly recognize and accept military judges for what they are that we can begin the task of preparing corrective legislation to make them what they should be.

Military Appellate Judges

The Uniform Code of Military Justice did not provide for appellate judges for the military services. Instead, each Judge Advocate General was directed to constitute in his Office one or more boards of review consisting of at least three members, either officers or civilians, admitted to the practice of law before the highest court of a state or a federal court.⁷⁴ Where the court-martial sentence extended to death, dismissal, or punitive discharge, involved a general or flag officer, or a sentence of confinement for one year or more, review before these boards was mandatory.⁷⁵ The ac-

71. W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 49.

72. *Id.*

73. *See*, Art. 22, UCMJ 10 U.S.C. § 822 (1964).

74. Art. 66(b), UCMJ, 10 U.S.C. § 866(b) (1964).

75. Art. 66(b), UCMJ, 10 U.S.C. § 866(b) (1964).

cused, upon request, was represented by a military lawyer at no expense to him, and he could employ his own civilian attorney at his own expense.⁷⁶

The powers granted to the boards of review were extensive. In considering a record of trial, the board could weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. It acted upon both the findings and sentence as approved by the convening authority. While it could not increase the severity of sentences, it could, and did, reduce inappropriately severe sentences thus providing appellate review of military sentences. The board could correct errors by reassessing the sentence, ordering rehearings, or ordering charges dismissed.

It was apparent that these boards of review were not administrative boards at all, but intermediate appellate courts. Hence, it was not surprising that a proposal to rename them should arise. This came, in at least one instance, in the form of S. 748.⁷⁷ That bill contained provisions to establish courts of military review by statute as appellate courts for each of the military departments, and locate them within their respective departments only for administrative purposes. Appellate judges, appointed by the secretary of a department, would comprise as many three-judge panels as were necessary. These judges could be either military officers or civilians, and one of them would be designated by the Secretary as chief judge, but only civilian judges would be eligible to so act. The judges must not only be qualified attorneys, have not less than six years' experience in the practice of military justice, but must meet such other qualifications as the secretary concerned might prescribe. The composition of the panels would be determined by the chief judge. He could require the court to sit en banc in any particular case, as could one-half of the judges of the court. Judges of one military department could sit on an appellate court of another military department when authorized to do so by the secretaries concerned. At least one judge of each panel had to be a civilian who had no past military connection such as being a retired officer of the armed forces. Military officers appointed as judges would receive a three year term of office, while civilian judges would serve during good behavior removable only for physical or mental disability or other good cause shown, upon notice of and a hearing ordered by the appropriate Secretary. Any person appointed to a court would be known as a military judge, and military officers in their work relating to court matters would be so addressed rather than by rank. The chief judge of the courts of military review could prescribe uniform rules of procedures binding upon all of the courts. No changes in the

76. Art. 70, UCMJ, 10 U.S.C. § 870 (1964).

77. 1966 *Hearings* at 497-02.

jurisdiction of the courts was contemplated from what it had been under the boards of review.

The Department of Defense objected to several aspects of this proposed bill. It considered the requirement that there be a civilian chief judge of each court harmful to the morale of military lawyers; that it would prove difficult to obtain civilians with six years' of military justice practice; that fixed tenure for military officers would make these officers unavailable for other duties during unusual circumstances; and, that members of the then current boards of review were independent so that tenure was unnecessary.⁷⁸

The provisions regarding courts of military review in the Military Justice Act of 1968 contained much less than what had been proposed, but much more than what had existed prior thereto. A court of military review was established for each department, not by statute, but by the respective Judge Advocates General.⁷⁹ Each court has the authority to subdivide into panels of not less than three appellate military judges, and cases may be heard either by panel or en banc. Appellate judges may be either civilian or military lawyers, as may the chief judge who is empowered to determine on which panel his subordinate judges will sit and which among them shall be designated senior judge of the panel. Uniform rules of procedure for the courts, however, continue to be the responsibility of the Judge Advocates General.⁸⁰

Although the law officer was merely renamed as a military judge and granted very limited additional authority, the members of the boards of review already possessed the powers of appellate judges so that renaming them judges resulted in conforming their titles to their existing duties. In the Army, as soon as the appellate judges were sworn in, they changed their practice of hearing oral arguments attired in military uniforms to judicial robes, and these judges have asserted that their court has the authority to issue extraordinary writs in aid of their appellate jurisdiction.⁸¹

It has been easy to observe that redesignating the boards of review as a court of military review in the Army has resulted in much more than a change of name. First, it appears clear from the early months of the Army Court of Military Review's operation that civilian appellate judges are unnecessary as military judges have acted in an exceedingly fair manner. And while the authors favor tenure for appellate military judges, some escape

78. *Id.* at 21-22, 504-07.

79. 10 U.S.C. § 866 (Supp. IV, 1969).

80. *Id.* § 866(f).

81. Westerman, *Court of Military Review*, 24 ARMY DIGEST 10 (1969). See *United States v. Epely*, No. 419683 (ACMR Apr. 6, 1970); *United States v. Draughon*, No. 419184 (ACMR Mar. 20, 1970); *United States v. Dolby*, No. 419804 (ACMR Sept. 19, 1969) (dictum).

clause must be built into any tenure provision to provide for rapid personnel changes that might be necessary in the event of a national emergency. But on balance, there is no doubt that the establishment of intermediate appellate courts has advanced and improved the military justice structure.

Modernized Trial Procedures

Under the Uniform Code of Military Justice prior to its recent amendment, a general court-martial could not function unless the law officer (now military judge), at least five members, counsel, and the accused were present.⁸² Hence, preliminary issues of an interlocutory nature could not be disposed of without first having the members of the court present. This resulted in a practice of gathering the trial participants on the date of the hearing, opening the court-martial with the members present, and then excusing the members for, normally two to four hours, while interlocutory motions, and legal problems, were resolved by the law officer. Such a practice was, of course, highly unsatisfactory to both the Government and the accused as there was additional cost to the Government and fear by the accused that the court members might be angered by their waste of essential time, particularly in a war zone such as Vietnam. This situation has been corrected by a statutory authorization to conduct Article 39(a) sessions by the judge alone,⁸³ as an authorized part of the court-martial trial, after charges have been served and referred for trial to a court-martial composed of a military judge and members. Such a session may also be held after reversal by an appellate court for limited purposes.⁸⁴ The military judge may determine whether trial by the judge alone is desired, hear and determine motions raising defenses and objections, hear and rule on any matter over which the judge has authority, such as the admission of evidence, hold the arraignment and receive the accused's plea, when authorized by regulations of the Secretary concerned,⁸⁵ and perform any procedural function under the general authority of the military judge. If an accused desires trial by the military judge alone, the judge may announce that the court-martial has "assembled", and conduct the entire trial. If the accused desires trial by members, the military judge may still receive the plea, and if it is "guilty", determine providency, and enter a finding of guilt. After the members assemble, he need only advise them that the accused's plea of guilty has been determined to be provident and has resulted in his conviction by the military judge. There-

82. Art. 39, UCMJ, 10 U.S.C. § 839 (1964).

83. 10 U.S.C. § 839 (Supp. IV, 1969).

84. ¶ 53d, MCM, 1969 (Rev.).

85. This is authorized in the Army by § 2-18b, C3, Army Regulations 27-10 (Nov. 26, 1968).

after, he would instruct the members on their duties to find an appropriate sentence.⁸⁶

Beyond question, the military judge is much more free to arrange and process his docket than was the law officer. The liberal provisions of Article 39(a) and the Revised Manual allow the military judge to exercise effective close control over his docket, if he will but take the initiative. Through such judicial supervision, cases may be brought to trial in an expeditious fashion, thus eliminating many complaints about denial of a speedy trial. Even if counsel tend to be dilatory as they sometimes do, in bringing their cases to trial, the military judge is now able to police the docket in such a way as to move the traffic along efficiently.

For example, the military judges of one Army judicial circuit operate their dockets in much the same way as do many civilian courts. Each Friday is reserved for an early-morning call of the calendar. All attorneys appear in court and answer when their cases are called. At such sessions, the military judge inquires of counsel: (1) the nature of the offense charged, (2) whether the accused desires trial by military judge alone or by a military judge sitting with court members, (3) the anticipated pleas of the accused, and (4) whether either side desires the court to hear motions prior to trial of the case on its merits. Flexibility is maintained in such calendar calls, and if for one reason or another a defense counsel is not ready to indicate the anticipated plea, or if the accused desires not to exercise his option concerning trial by military judge alone until a later date, no issue is made of the matter. The calendar call is in no sense a part of either the Article 39(a) session, or the trial of the case on its merits. Instead, it is in the nature of a preliminary inquiry in the presence of counsel for both sides concerning the disposition of matters which will facilitate trial of the case. The authority for such inquiry prior to trial is found in paragraph 61, *Manual For Courts-Martial*, 1969 (Revised edition):

A court-martial should not be called to order for any session of the trial of a new case until the military judge . . . after examining the order convening the court and making an informal inquiry of the personnel present has determined that the accused and, if the presence of the members is required at such session, a quorum of the court are present for the trial of the case The military judge should also inquire into the existence of a request by the accused for trial by the military judge alone in appropriate cases.

Although John P. Frank is critical of calendar calls, primarily on the basis of the billable time lost by private practitioners in attending such calls,⁸⁷

86. See Appendix 8, MCM, 1969 (Rev.).

87. J. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 130 (1969).

military practitioners are not confronted with a similar problem regarding fees, and experience with the calendar call indicates that it is efficient and effective for purposes of military justice administration. In particular, it is highly desirable that the military judge assume control of the case at the earliest possible point, particularly where there may be requests for production of evidence, motions for depositions or other immediately needed relief of one kind or another, or similar related matters that can be handled much more effectively by the military judge than by the trial counsel acting alone or through the convening authority.

If complicated issues are likely to arise during trial of the case, the combination of a weekly calendar call and early Article 39(a) sessions enables the military judge to become aware of the situation, and he may then call upon counsel to provide assistance to the court through briefs or written submission of requests for particular instructions that may be desired upon trial of the case. Each judge will vary the procedure to meet the requirements of the local jurisdiction, but there is much leeway now for the creative solution of many of the routine problems that tend to encumber the efficient administration of court business. The present system is a decided improvement over the former procedures.

Right to Legal Counsel

As a matter of historical interest, it appears clear that the Sixth Amendment right to counsel "was never thought or intended or considered, by those who drafted the sixth amendment or by those who lived contemporaneously with its adoption, to apply to prosecutions before courts-martial."⁸⁸ The serviceman's right to legal counsel stems instead from laws enacted by the Congress.

Under the Uniform Code of Military Justice prior to the Military Justice Act of 1968, both trial and defense counsel detailed to general courts-martial were required to be lawyers who were certified as competent in military law by their respective Judge Advocates General.⁸⁹ After a few years of operating under the Code, decisional law extended the right to representation by certified defense counsel during the military counterpart of the grand jury, the Article 32 investigation, and prohibited the rather widespread practice of permitting nonlawyers to represent accused at their request in general court-martial trials.⁹⁰ These changes made certified law-

88. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 49 (1958).

89. Art. 27, UCMJ, 10 U.S.C. § 827(b)(2) (1964).

90. In *United States v. Tomaszewski*, 8 U.S.C.M.A. 266, 24 C.M.R. 76 (1957), the Court of Military Appeals confirmed the military accused's right to be represented by an attorney during the pretrial hearing. Later, in *United States v. Kraskouskas*,

yers available as defense counsel in all pretrial proceedings leading to, and in all trials by, general court-martial.

At the same time that lawyers were being provided in general courts-martial trials, the Code limited accused persons tried by special courts-martial to the options of employing civilian counsel at their own expense, or requesting military lawyers who would only be provided if reasonably available.⁹¹ Normally, at least in the Army, lawyers were found to be unavailable, and detailed defense counsel would usually be nonlawyers.⁹² In 1963 the United States Court of Military Appeals was forced into deciding whether accused persons before special courts-martial were entitled to lawyer defense counsel, because one of the Navy's intermediate appellate tribunals held the Sixth Amendment guaranteed the right to legally qualified counsel in a special court-martial case where the accused was convicted of six specifications of larceny, and was sentenced to a bad conduct discharge and accessory penalties.⁹³ The Judge Advocate General of the Navy thereafter, under his statutory certification authority, ordered review by the United States Court of Military Appeals.⁹⁴ Judge Kilday, who authored the court's opinion, stated the traditional view that "qualifications of counsel for courts-martial are a matter within the sound discretion of Congress,"⁹⁵ as the Sixth Amendment does not apply to trials by courts-martial. Chief Judge Quinn and Judge Fedguson both concluded that the Sixth Amendment applies to trials by courts-martial, with the former finding the provision of non-lawyer counsel pursuant to Article 27(c) adequate compliance with the Constitution,⁹⁶ and the latter finding that the accused was denied no rights since he chose to be represented by the detailed nonlawyer officers who defended him.⁹⁷ Both the Chief Judge and Judge Ferguson believed it was undesirable, but legally permissible, to permit nonlawyers to practice before special courts-martial empowered to impose bad conduct discharges.⁹⁸

Litigation concerning the use of nonlawyers as counsel in special courts-martial also arose outside of the military criminal system. In 1965, Stap-

9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958) the court required counsel before general courts-martial to be fully qualified attorneys.

91. Only when the trial counsel was an attorney was it required that the defense counsel be a lawyer. See UCMJ art. 27(c), 10 U.S.C. § 827(c) (1964).

92. In 1966 the military services reported "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 . . ." 1966 *Hearings* at 912.

93. *United States v. Culp*, No. 63-00442 (NBR May 31, 1963).

94. *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

95. *Id.* at 216, 33 C.M.R. at 428.

96. *Id.* at 217, 33 C.M.R. at 429.

97. *Id.* at 219, 33 C.M.R. at 431.

98. *Id.* at 218, 221, 33 C.M.R. at 430, 433.

ley,⁹⁹ a military prisoner in Utah, brought a writ of habeas corpus to secure his release from confinement imposed by special court-martial. As he was indigent, he had requested that a lawyer defense counsel be detailed to represent him, but this request was denied. The detailed military defense counsel were, as in most Army cases at the time, nonlawyers with little or no experience in court-martial proceedings. Upon advice of nonlawyer counsel, he pleaded guilty pursuant to a pretrial agreement with the convening authority limiting any period of adjudged confinement to no more than two months.

The district judge determined that the nonlawyers who defended Stapley "were wholly unqualified to act and failed to act as 'counsel' with respect to military law, procedure, trial or defense practicality, or at all"¹⁰⁰ and he stated that the trial "constituted no more than an idle ceremony or form in accordance with a script arranged beforehand. . . ."¹⁰¹ The writ was granted and Stapley was freed. The government did not appeal.

It soon became evident that *Stapley* was a unique case largely compelled by its individual facts. *LeBallister v. Warden*¹⁰² involved a military accused convicted at two separate special courts-martial for absence without leave, and each conviction resulted in a sentence to confinement at hard labor for six months, as well as partial forfeitures of pay. No request for either civilian or military lawyer counsel was made, and representation was by regularly detailed nonlawyer counsel. LeBallister sought a writ of habeas corpus because he was not afforded competent counsel, and considering the ruling in *Stapley*, it was anticipated that he would prevail. But in denying the writ, Chief Judge Stanley distinguished *Stapley* as involving a more serious crime, and also limited that case expressly "to the peculiar circumstances of the case, including 'the frustration of the petitioner's efforts to obtain qualified legal services because of his financial inability to pay for them,' circumstances not present here."¹⁰³ The Chief Judge also pointed out that LeBallister's military nonlawyer counsel "represented him at each trial ably and as effectively as was possible under the circumstances,"¹⁰⁴ and then he concluded with a statement of the traditional view regarding the rights of military accused:

An accused before a military court is not entitled as a matter of right under the Sixth Amendment to representation by legally trained counsel. The right of an accused to be so represented at

99. *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965).

100. *Id.* at 319.

101. *Id.*

102. 247 F. Supp. 349 (D. Kans. 1965).

103. *Id.* at 352.

104. *Id.* at 351.

a general court-martial springs not from the Sixth Amendment, but from the action of Congress under Section 8, Article I of the Constitution. No such right is accorded by Congress to one being tried by special court-martial.¹⁰⁵

LeBallister was followed by *Kennedy v. Commandant*¹⁰⁶ where the court stated that the Constitution confers upon Congress the power to provide for trials in the armed forces,¹⁰⁷ and that military personnel derive their rights not from the courts, but from the Congress.

The Military Justice Act of 1968 amended Article 19,¹⁰⁸ Uniform Code of Military Justice, so that a special court-martial may not impose a bad conduct discharge unless a qualified lawyer is detailed as defense counsel. This has ended the punitive separation of servicemen represented only by officers untrained in the law. Article 27,¹⁰⁹ Uniform Code of Military Justice, has also been amended so that in all other special courts-martial, the accused must be afforded certified counsel unless such counsel can not be obtained on account of physical conditions or military exigencies. In that event, the convening authority must make a detailed written statement as an appendage to the record of trial, relating why lawyer counsel could not be obtained.

In actual practice in the Army, lawyer defense counsel are being provided in every case, even in Vietnam, if the accused so requests. The Judge Advocate General of the Army has certified numerous lawyers who are not members of the Judge Advocate General's Corps, and the size of the Corps itself has been increased in order to meet the increased demands for legal representation.

We recommend that additional steps be taken to assure that military lawyer defense counsel are fully free to defend their clients. An independent, central defense organization should be created in each of the armed services with all general court-martial defense counsel assigned as a part thereof, with duty stations in the field. In this manner, defense counsel would be always serving under and rated by other defense counsel within the defense framework of the service involved.¹¹⁰

In addition, the services should consider authorizing military defense counsel to file writs of habeas corpus on behalf of their clients in appropriate cases in Federal district courts. It is noted that when a soldier secures

105. *Id.* at 352.

106. 377 F.2d 339 (10th Cir. 1967), *motion for writ of habeas corpus denied*, 389 U.S. 807 (1967).

107. *Id.* at 342.

108. 10 U.S.C. § 819 (Supp. IV, 1969).

109. 10 U.S.C. § 827 (Supp. IV, 1969).

110. This form of organization was created for military judges by 10 U.S.C. § 826(c) (Supp. IV, 1969).

a civilian lawyer at his own expense and asserts his rights in the federal courts, the Government reply is frequently written by a military officer assigned to the Litigation Division, Office of The Judge Advocate General, Department of the Army. It would appear only fair to provide the soldier with equal assistance.

Post-Trial "Bail"

Historically, a military accused could not secure his release pending appeal. However, the addition of Article 57(d)¹¹¹ to the Code now permits the deferment of a sentence to confinement pending appellate review. This is the military equivalent of the civilian bail pending appeal; it must be clearly understood, however, that it is not in the nature of clemency. Deferment results in postponing the serving of a sentence to confinement, and if the deferment itself is rescinded for any reason, or if the sentence is ordered executed, the confinement time may have to be served unless relief is given on a purely discretionary basis.

The application for deferment must be made to the convening authority, or if the accused has been transferred, the officer exercising general court-martial jurisdiction over the accused. Deferment is appropriate in those cases where there is "likelihood of success" on appellate review or where policy reasons justify deferment.¹¹² Likelihood of success is not tested by the reasonable doubt standard, but may be found in all cases having a substantial question of law.¹¹³

Action on a deferment application is discretionary with the officer empowered to grant deferment. The nature of the discretion residing in the empowered officer has been characterized "as sole and plenary. This was done in order to assure the greatest possible freedom of action on the part of the officer possessing this authority."¹¹⁴ This language will make it difficult, if not impossible, to contest denials of deferments. It appears that the only issue which may be litigated is abuse of discretion. It is clear that denials are appealable administratively to the next higher commander or to the Judge Advocate General in cases undergoing review pursuant to Article 66, Uniform Code of Military Justice.¹¹⁵

As noted, deferment terminates upon the ordering of a sentence into execution, and thereafter confinement may be either approved, or suspended,

111. 10 U.S.C. § 857(d) (Supp. IV, 1969).

112. FED. R. CRIM. P. 46(a)(2) (appeal must not be frivolous or taken for delay).

113. See *Cohen v. United States*, 277 F.2d 760 (9th Cir. 1962), *cert. denied*, 369 U.S. 865 (1962).

114. ¶ 88f, Analysis of Contents, MCM, (1969 (Rev.)).

115. This is the Army practice. See DA Message 940385 (Feb. 6, 1970).

but it may not be further deferred. Prior to execution, the deferment may be rescinded at any time. There is some conflict on the authority to rescind deferment because while the implementing Manual provides that the power is "sole and plenary,"¹¹⁶ that phrase is conspicuously absent from Article 57(d). The intent of the Manual is apparently to deny servicemen a right to a hearing before deferment is rescinded.

Deferment of serving a sentence to confinement may prove to be one of the most useful tools found in the amendments of the 1968 act. While it has not been used on any significant scale since the effective date of the provision, it has been applied to a few cases.¹¹⁷

Command Influence Prohibited

Instances of illegal command influence in the Army have been rare under the Uniform Code of Military Justice. The Code was in effect more than ten years before the first significant case reached the military's highest court in 1961,¹¹⁸ and another six years passed before the court again acted on this issue.¹¹⁹ In the latter instance, it has been reported informally that the command may have been operating under an outdated Manual for Courts-Martial¹²⁰ at the time of the trials therein involved.

Accordingly, the 1968 amendments to the Code made only two minor changes relating to unlawfully influencing the action of courts. Statutory recognition was given to the need of commanders to provide general instructional or informational courses in military justice,¹²¹ while withdrawing from them the authority to consider the court-martial performance of members and defense counsel in the preparation of effectiveness, fitness, or efficiency reports.¹²²

Summary Courts-Martial

The amendment affecting the summary court-martial, in effect, guarantees a serviceman easy access to special courts-martial, and lawyer defense counsel.¹²³ Under prior law, a serviceman was allowed to refuse trial by sum-

116. ¶ 88g, MCM, 1969, (Rev.).

117. The most noteworthy of which is a Green Beret officer sentenced to twenty-four years' confinement at hard labor for murder. *United States v. McCarthy*, No. 417936 (Pending decision before the United States Army Court of Military Review).

118. *United States v. Kitchens*, 12 U.S.C.M.A. 589, 31 C.M.R. 175 (1961).

119. *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

120. The convening authority reportedly was using the 1928 version of the MANUAL FOR COURTS-MARTIAL in making his decisions about courts-martial procedures. At the time, that Manual and the 1949 Manual had been replaced by the 1951 Manual.

121. 10 U.S.C. § 837(a) (Supp. IV, 1969).

122. *Id.* § 837(b).

123. *Id.* § 820.

mary court-martial only if he had not previously been offered and had refused disposition of his case by non-judicial punishment.¹²⁴ Now servicemen have an absolute right to object to trial by summary court-martial, and they may thereafter be tried either by special or general courts-martial.¹²⁵ Consequently, regardless of how minor the offenses might be, servicemen may now refuse nonjudicial punishment (except when attached to or embarked in a vessel) and summary courts-martial. They may obtain trial by a higher court, lawyer defense counsel, automatic appeals upon convictions, and other incidental rights. Under these circumstances, anyone now tried by summary courts-martial probably prefers such a trial because of the limited punishment powers of this court.¹²⁶ Thus, it can be anticipated that summary courts-martial will no longer be an object of attack to military justice reformers.

Post-Conviction Remedies

Substantive changes have been made improving two forms of military post-conviction relief. The time period in which petitions for new trials may be filed has been extended from one to two years.¹²⁷ In addition, this provision was expanded to apply to all courts-martial,¹²⁸ while its predecessor applied only where the sentence extended to "death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more."¹²⁹

Another change concerns extraordinary relief which may be granted in those cases not within the review jurisdiction, or otherwise not reviewed by, a Court of Military Review. In these cases, even though normal appellate review has been completed, the accused may apply to the Judge Advocate General of his service for extraordinary relief which may be given on the basis of newly discovered evidence, fraud on the court, lack of jurisdiction, or errors prejudicial to the substantial rights of the accused.¹³⁰ The primary advantage of this provision is that it provides a more objective review of those many summary and special courts-martial otherwise reviewed solely within the command in which they were tried in the field.

124. Art. 20, UCMJ, 10 U.S.C. § 820 (1964).

125. The proposed bill, S. 759, would have abolished the summary court-martial, but the Department of Defense objected to this action. See *1966 Hearings* at 619-25.

126. A summary court-martial may confine for one month, punish by hard labor without confinement for 45 days, forfeit two-thirds of a soldier's pay for one month, and impose certain reductions in grade.

127. 10 U.S.C. § 873 (Supp. IV, 1969).

128. It was an anomaly that whether one had a right to a new trial depended upon the severity of his sentence.

129. Art. 73, UCMJ, 10 U.S.C. § 873 (1964).

130. 10 U.S.C. § 869 (Supp. IV, 1969).

The Convening Authority: Locus of Power

True power in our system of military justice resides not in the military judge, the staff judge advocate, or any other legal functionary, but in the convening authority. In military justice, the power of the convening authority transcends anything found in our federal or state system of criminal justice. It is not wide of the mark to say that in the British system of military justice of 1775, and in our own early system of military justice (taken from the British, as we have indicated, *supra*) the power of the convening authority was almost absolute.¹³¹ In examining the current civilianization of our military justice system, it can be readily discerned through even the most superficial examination that the power of the convening authority has been diminished over the years. Whether the convening authority still retains too much power, however, remains as a relevant inquiry.

Under the Code, a military commander who has information indicating that a person subject to his authority is implicated in the commission of an offense cognizable by courts-martial must "determine what disposition should be made thereof in the interest of justice and discipline. . . ."¹³² Although justice is mentioned first by the Code, discipline is, even today, of vital concern to commanders.¹³³ We do not argue, given the nature of military operations in the field against an enemy force, and the constant necessity to maintain troops in a state of readiness for such operations, that there is anything wrong with any military commander being more concerned professionally with discipline than with justice. As one irate commander told his staff judge advocate, in an apocryphal story from the Second World War, "We're over here to fight the Germans, not to sue them." But we suggest that in view of the understandably paramount concern of any commander for discipline, he is not the official who should wield almost total judicial power in our system of military justice. Our regret concerning his desire for discipline stems from the fact that the commander does wield almost complete judicial power, not from the fact that the commander wants discipline more

131. "[T]he function of a court-martial is, regularly, completed in its arriving at a sentence or acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result until reviewed and concurred in, or otherwise acted upon, by [the convening authority]." WINTHROP, *MILITARY LAW AND PRECEDENTS* 447 (2d ed. 1920).

132. Art. 30, UCMJ, 10 U.S.C. § 830 (1964).

133. See Ryker, *The New French Code of Military Justice*, 44 *MIL. L. REV.* 71, 93 (1969) where that author states that "the aims of our two systems of military justice [French and American] are the same—swift enforcement of military order and discipline while guaranteeing to the accused the maximum legal protections reasonably available under the circumstances."

than he wants justice. Since military operations per se are almost the antithesis of the judicial process, we think it is futile to waste time berating commanders for not acting like justices of the Supreme Court. Indeed, we suggest that a commander whose primary concern is justice instead of the accomplishment of his military mission, certainly stands outside the tradition of great military leaders and probably is less effective as a soldier for doing so. It would be just as unreasonable to expect a military commander to have the same degree of concern for the preservation of human life and the prevention of suffering as that entertained by a physician.

In any event, in determining what disposition should be made of a given case, the convening authority will make, or will cause to be made, a preliminary inquiry to enable him to make an intelligent disposition of the matter.¹³⁴ If the allegations are so serious that dispositions by general court-martial may be appropriate, then an investigation must be conducted by a commissioned officer in accordance with the provisions of Article 32 of the Code.¹³⁵ It has been suggested by some commentators that the Article 32 investigation takes the place of, and in most respects is entirely superior to, a civilian grand jury investigation.¹³⁶ Justice Douglas, writing for the majority in *O'Callahan v. Parker*,¹³⁷ obviously does not agree. He commented:

We have concluded that the crime to be under military jurisdiction must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," [footnote omitted] as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.¹³⁸

We think that the liberal discovery practice made possible by the Article 32 investigation is superior to the secrecy of civilian grand jury proceedings, and we question whether grand jury secrecy is really necessary as maintained in most civilian jurisdictions. But we also think that the civilian grand jury is far more independent than the Article 32 investigating officer, and certainly has more control over the decision of whether to try an accused or dismiss the charges against him. Certainly there are those who assert that the grand jury is obsolescent, and that its functions have been turned over to the prosecutor for all practical purposes.¹³⁹ Yet, there are

134. ¶¶ 32-35 MCM, 1969 (Rev.).

135. Art. 32, UCMJ, 10 U.S.C. § 832 (1964).

136. Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 MAINE L. REV. 105, 109-14 (1970); Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1, 10-12 (1961); cf. Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. REV. 1240, 1241-43 (1968).

137. 395 U.S. 258 (1969).

138. *Id.* at 272.

139. I. CALLISON, *COURTS OF INJUSTICE* 408 (1956).

striking instances of grand jury independence to be found, even in modern American jurisprudence.¹⁴⁰ We are not prepared to say that the Supreme Court is wrong in attaching some value to the grand jury as an institution. But the real problem with military law at this stage of a criminal case is not that the Article 32 investigation, per se, is inferior in any way to the investigation conducted by a grand jury. The real problem is that, once again, as all through military law, the convening authority holds ultimate power, not the Article 32 investigating officer.

The Article 32 officer forwards a report of his investigation to the convening authority, along with recommendations as to disposition.¹⁴¹ The convening authority, however, is in no way bound by the advice of the Article 32 officer.¹⁴² Similarly, although the staff judge advocate must prepare a summary for the convening authority's consideration of the case (called an "advice" in military law), the convening authority is not bound to follow the recommendations of his staff judge advocate. It is true that the Code provides that a commander may not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under the Code and is warranted by evidence indicated in the report of investigation.¹⁴³ He may nevertheless send the case back to the Article 32 investigating officer, or appoint a new one, if he disagrees with the findings made in the initial (or any subsequent) report.¹⁴⁴

As Justice Black pointed out, "Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment."¹⁴⁵ The grand jury is in no way obligated to the prosecutor. Contrast that with the situation of the Article 32 investigating officer, who enjoys none of the protections afforded a military judge. The Article 32 officer is usually a member of the local command, and is usually a line officer rather than a member of a Judge Advocate General's Corps. He is rated by local commanders, who themselves may be rated by the convening authority involved.

140. An instructive example is the action of the grand jury that indicted Mr. Adam Clayton Powell in 1958 for income tax evasion. For different points of view as to the propriety of that grand jury's action, see E. WILLIAMS, *ONE MAN'S FREEDOM* 206-24 (1962) and W. BUCKLEY, *RUMBLES LEFT AND RIGHT* 76-83 (MacFadden ed. 1964).

141. Art. 32, UCMJ, 10 U.S.C. § 832 (1964).

142. In *United States v. Cunningham*, 12 U.S.C.M.A. 402, 30 C.M.R. 402 (1961), Judge Ferguson said: "A pretrial investigation conducted under the provisions of Code, supra, Article 32, is designed to obtain an impartial inquiry into the facts and circumstances surrounding the charges against the accused and to gain a soundly conceived recommendation concerning their disposition." (Emphasis added.) *Id.* at 404, 30 C.M.R. at 404.

143. Art. 34, U.C.M.J., 10 U.S.C. § 834 (1964).

144. *United States v. Smelley*, 33 C.M.R. 516 (1962).

145. *In re Oliver*, 333 U.S. 257, 264 (1948).

The opportunities for command influence are virtually unlimited, insofar as the relationship between the Article 32 officer and the convening authority is concerned. The Article 32 investigating officer is not independent, and his findings and recommendations are purely tentative, insofar as the convening authority is concerned. In the vast majority of cases, convening authorities do follow the recommendations of the Article 32 investigating officers on cases in their commands, and they do follow the advice and recommendations of their staff judge advocates. But the point is that they are not obliged to do so by law. As the Army's official guide for staff judge advocates states:

In the final analysis the decision of the commander determines whether charges are referred to a general court-martial, disposed of by reference to an inferior court-martial, or disposed of by the imposition of non-judicial punishment under Article 15.¹⁴⁶

It is significant to note in passing that the staff judge advocate is told, through official Army publications, that his primary business is to serve his commander and no one else. Adopting the general point of view of the military services that discipline is an important consideration, the Army's guide for staff judge advocates states: "Military justice in a very real sense represents the correctional side of military discipline."¹⁴⁷ That guide also reads:

The convening authority therefore has a vital and continuing interest in the status of military justice administration in his command. He will evaluate his staff judge advocate in a large measure by the effectiveness and quality of legal service in the area of military justice.¹⁴⁸

The guide advises: "The staff judge advocate must acquaint himself with the personality and the policies of his commander."¹⁴⁹ This is true because "a poorly tried case reflects adversely on the command."¹⁵⁰ When it is remembered that the staff judge advocate, who occupies the position indicated by the above quoted excerpts, plays a significant role in assisting the convening authority in decisions about who shall be tried and who shall not be tried, it becomes clear that the Article 32 investigation, for all its virtues, is not quite what it is frequently represented to be. The convening authority must consider the Article 32 investigation report, but that report is interpreted for the convening authority by the staff judge advocate, and

146. Department of Army Pamphlet 27-5, STAFF JUDGE ADVOCATE HANDBOOK 8 (July 19, 1963) [hereinafter cited SJA HANDBOOK].

147. *Id.* at 7.

148. *Id.* at 7-8.

149. *Id.* at 8.

150. *Id.* at 11.

as the Army's guide makes plain:

First, the staff judge advocate of a command is a staff officer and, as such, has the duty to assist the commander to command effectively and to accomplish the assigned mission. Second, as a judge advocate he is the military legal advisor to the commander.¹⁵¹

In the final analysis, according to the Army:

The staff judge, advocate should accommodate himself to the convening authority. By this it is not meant that he be servile in any derogatory sense, rather, that he be responsive under all the circumstances.¹⁵²

And the staff judge advocate is informed that he must keep in mind that:

As his efficiency report will usually be prepared by the chief of staff, the staff judge advocated must be a working and cooperative member of the staff.¹⁵³

But the power of the convening authority is not limited to the obvious degree of control that he has over the initial investigative stage of the cases in his command, and the decision of whether to bring any given case to trial. The Court of Military Appeals candidly acknowledged this in *United States v. Kirsch*¹⁵⁴ when it said:

Congress did not merely invest the commander with authority to decide whether to dismiss or drop a charge before trial. It also conferred upon him the power to free an accused from the penalty of any offense committed by him in violation of the Uniform Code, if he believes such action would further the accomplishment of the military mission. By virtue of that power, a commander having court-martial jurisdiction can set aside even a judicial determination of guilt.¹⁵⁵

The court commented on what it subsequently termed "the vastness of the power"¹⁵⁶ of the convening authority, in *United States v. Massey*:¹⁵⁷

The legislative history of the Code makes it clear beyond doubt that the words 'in his discretion' were intended to grant to the convening authority an exceedingly broad power to disapprove a finding or a sentence. Originally these words were absent from the Code's draft. However, from the first the official commentary on the proposed Article 64 of the Code stated that the convening authority "may disapprove a finding or a sentence for any reason. . . ." Certain of the colloquy concerning the drafts-

151. *Id.* at 75.

152. *Id.* at 76.

153. *Id.*

154. 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964).

155. *Id.* at 91, 35 C.M.R. at 63.

156. *Id.*

157. 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955).

men's intention is highly pertinent. . . .

"Mr. BROOKS. He [the convening authority] doesn't have to read the record or anything else [sic]. He can just say disproved and it is through.

Mr. LARKIN. That is right."¹⁵⁸

If the power to set aside the findings and sentence "for no reason at all" does not seem clear enough in light of the above, consider the further observations of the Court of Military Appeals in the *Kirsch* case:

The transcendental nature of the power of a commander having courts-martial authority to exonerate from punishment is further evidenced by the fact that he need not wait until conviction to exercise it. At any stage of the trial he can order the charges withdrawn, and the trial discontinued. . . . Congress placed no limitation whatever on the exercise of this power. . . .¹⁵⁹

At first glance, this power of the convening authority to set aside all findings of guilty and all sentences "for no reason at all" appears to be a salutary infusion of commendable clemency power into our system of military justice. But there are other implications of such power in the hands of convening authorities. Two examples should suffice. What becomes, for example, of the charges brought by a hypothetical Army private against a commissioned officer for unlawful confinement of the private in violation of Article 97,¹⁶⁰ if the convening authority decides to dismiss the case "for no reason at all"? What becomes of the charges, brought by any hypothetical accused person, against, say, a convening authority himself for unnecessary delay in the disposition of charges against that accused person in violation of Article 98,¹⁶¹ if the superior convening authority decides, "for no reason at all" to dismiss that complaint of unnecessary delay? It is interesting, and it is highly significant, that in the entire history of the Uniform Code of Military Justice, there has never been a single prosecution against anyone for unnecessary delay in the disposition of any case, even though there are numerous instances of reversals of convictions for such delay and denial of the right of speedy trial.¹⁶² In view of this almost absolute power of the convening authority to insulate any and all members of his command from the prosecution of any such charge, the total lack of prosecutions under Article 98 is not surprising. And the Army's admonition to its staff judge advocates in the official handbook, quoted *supra*, takes on greater signifi-

158. *Id.* at 520, 18 C.M.R. at 144.

159. 15 U.S.C.M.A. at 92, 35 C.M.R. at 64.

160. Art. 97, UCMJ, 10 U.S.C. § 897 (1964).

161. Art. 98, UCMJ, 10 U.S.C. § 898 (1964).

162. *See* United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967), where there was a 318 day delay between arrest and trial.

cance: "A poorly tried case reflects adversely on the command."¹⁶³

It is an illusion, therefore, to contend that military judges and staff judge advocates have real control of the American system of military criminal justice. Real control is where it has always been, and where it is quite likely to remain: in the hands of the lay military commanding officers who are the convening authorities.

Suggestions for Reform

We hesitate to set forth even the most tentative suggestions for reform of the present system of military justice. This is not because we are unable to perceive the problems: we trust that the foregoing discussion in this paper indicates that we know that problems do exist, and that we know what the most critical of those problems are.

It is not our purpose, however, to reform the system. It is our purpose to alert the profession generally, military practitioners in particular, and all others who are deeply interested in military justice, to the fact that the problems not only exist, but are recognized by military lawyers and judges themselves. Experience with previous reforms teaches that the detailed provisions for needed legislative enactments must be hammered out in congressional committees through the long and tedious processes of hearings, proposed drafts, more hearings, more drafts, and the like. It is neither a simple nor an easy process, and considerable legal and legislative talent is required for each significant step forward. Not the least is the need for any change to be consistent with overall needs of the armed services themselves.

Respect for the complexity of our national legislative process compels us to refrain from advocating a detailed program for immediate enactment. We leave that task to others. Instead we merely desire to indicate broadly what reforms are necessary. With that qualification, then, we urge the following changes to the present system:

(1) Military trial judges must be made more like Federal district judges, with tenure and the independence which follows from tenure. Their decisions must not be subject to overruling action by lay military convening authorities, or any other military authorities except duly constituted Courts of Military Review or the Court of Military Appeals, and other Federal courts.

(2) Convening authorities must be divested of their power to determine the membership of the courts-martial that they convene.¹⁶⁴

(3) Defense counsel for all court-martial cases must be made truly independent, and fully insulated from the pressures that may now be exerted on them.

163. SJA HANDBOOK at 11.

164. See Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATHOLIC L. REV. 171 (1966) for some detailed suggestions for changes in this area.

(4) Judges of the Courts of Military Review must be given independence and tenure adequate to enable them to discharge their responsibilities.

(5) The Courts of Military Review must be specifically provided with the authority to issue extraordinary writs in aid of their appellate jurisdiction.

These are the basic essentials. An outstanding step forward would be the enactment, with minor modifications designed to strengthen the measures, of the bills introduced in the Senate and House by Senator Tydings of Maryland and Representative Whalen of Ohio, respectively.¹⁶⁵ Those bills need to provide for reform of special court-martial panels, as well as general court-martial panels, and to the extent that they do not do so, they will not fully accomplish the reforms envisioned by their sponsors. But they represent good first steps forward.

In conclusion, we desire to record our recognition of the difficulty in proposing reforms of the kind indicated. With Charles Alan Wright, we know:

Any proposal for substantial change in any area of law is sure to meet with determined opposition from those who have, or think they have, a vested interest in preserving the status quo. Lawyers are notoriously conservative—and notoriously short-sighted.¹⁶⁶

And yet, as Justice Frankfurter observed:

[E]very lawyer belongs to a system which, in the course of seven or eight centuries, has done mightily to bring about as much of civilization as we have today. It may be said that it is not too much that we have achieved, but yet it is a great deal as compared with the alternatives. It is the legal profession beyond any other calling that is concerned with those establishments, those processes, those criteria, those appeals to reason and right, which have had a dominant share in begetting a civilized society.¹⁶⁷

Military justice is one of those establishments, one of those processes, with which lawyers in this country *must* be concerned if military justice, ultimately, is to evolve into an “appeal to reason and right” which will have a significant share in begetting a civilized society. It is our hope that the legal and military professions will act effectively in this area to meet the need that exists.

165. See S. 3117, 91st Cong., 1st Sess. (1969); H.R. 15016, 91st Cong., 1st Sess. (1969).

166. Wright, *John Frank and the Radical Reform of American Law: An Introduction*, 47 TEX. L. REV. 965, 967 (1969).

167. F. FRANKFURTER, *OF LAW AND LIFE & OTHER THINGS THAT MATTER* 149 (1965).

The Catholic University of America

Member, National Conference of Law Reviews

Law Review

VOLUME XIX

SUMMER 1970

NUMBER 4

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