DEPARTMENT OF THE ARMY PAMPHLET 27–100–Bicentennial Issue

MILITARY LAW REVIEW BICENTENNIAL ISSUE

HEADQUARTERS, DEPARTMENT OF THE ARMY SEPTEMBER 1975

MILITARY JUSTICE: ABOLISH OR CHANGE??

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I. AN ESTIMATE OF THE SITUATION

From the viewpoint of the large majority of the people of the United States, World War I and World War II were popularly supported wars. Yet each was followed by significant criticism of the administration of criminal justice in the armed forces.[1] It is not surprising, then, that the Vietnam conflict—a highly controversial undertaking—generated a multitude of articles, mostly critical, about various aspects of the present system of military justice.[2] This widespread interest in

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[1] As to World War I, see Brown, The *Crowder-Ansell Dispute:* The Emergence d General *Samuel* T. *Ansell,* 35 MIL. L. REV. 1 (1967). For examples of World War II criticism, *see* REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE, Dec. 13, 1946, chaired by Arthur T. Vanderbilt of New Jersey [hereinafter cited as VANDERBILT REPORT]; Pasley and Larkin, *The Navy* Court-Martial: *Proposals for its Reform*, 33 CORNELL L.Q. 195(1947); Comment, *Codified* Military *Injustice,* 35 CORNELL L.Q. 151 (1949).

[2] The following symposia are illustrative: *Justice in the* Military, 22 MAINE L. REV. 3 (1970); *Military Law*, 22 HASTINGS L.J. 201 (1971); *Due Process in the Military*, 10 SAN DIEGO L. REV. 1 (1972); *Military Law*, 10 AM. CRIM. L. REV. 1 (1971). The latter contains a 19-page bibliography of recent books and works about military law, but principally about military justice.

The articles in these symposia show that legal scholars with limited experience in the administration of criminal law, military or civilian, are generally more critical of the administration of military justice than authors with extensive experience in criminal law. Military justice did not escape criticism from within the military, however. Non-lawyer military men condemned the system because it is "so ponderous and obtuse that a unit commander cannot possibly have the time or the means to apply the system. . . ." Howze, *Military Discipline and National* Security, 21 ARMY, Jan. 1971, at 13. Complaints of this type from commanders became so strident during the latter part of the Vietnam conflict that the then Chief of Staff of the Army, General William C. Westmoreland, appointed a committee under the chairmanship of Major General S. H. Matheson, a non-lawyer with extensive experience as a troop commander at division and lower levels, to evaluate military justice. The committee found that the complaints of commanders "that military justice, as presently administered, has had an adverse effect on morale and discipline" were not supported by the facts and that the complaints indicated an ignorance of the system by those affected by it, particularly junior officers and noncommissioned officers. REPORT TO GENERAL WILLIAM C. WESTMORELAND, CHIEF OF

military criminal law was due, not only to the length, media exposure, and unpopularity of the Vietnam imbroglio, but also to the criminal law explosion, which occurred during the same period as that conflict. The explosion was a result of the rising crime rate and the decisions of the Supreme Court of the United States in cases such as *Gideon v. Wainwright*,[3] *Miranda v. Arizona*,[4] and *Argersinger v. Hamlin*.[5] These decisions thrust thousands of lawyers into a field of the law with which they were almost totally unfamiliar and which many of them had previously considered to be an undesirable area of legal practice. When these lawyers found themselves handling criminal cases for the first time, they discovered a system of criminal justice that had been largely unchanged for almost 200 years. There was agreement among many members of the bar that reform and improvement of the civilian system of criminal justice was long overdue.[6]

Shortly after the *Gideon* decision was handed down, the Institute of Judicial Administration proposed to the American Bar Association (XBA) that the latter take on the task of developing standards for the Administration of Criminal Justice in state and federal courts. The ABA accepted the proposal and, after ten years of work by some of the best and most experienced lawyers and judges in the nation, the seventeenth and final draft of Standards for Criminal Justice (Standards)' was approved in February 1973. Chief Justice Warren E. Burger characterized the ABA project as "perhaps the most ambitious single undertaking in the history of that great organization."[8] Commenting on the development of the Standards from his position as one of the three chairmen of the Special Committee which supervised the project, as well as from the vantage point of a chairman of one of the

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STAFF, U.S. ARMY, BY THE COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE, June 1, 1971.

[3] 372 U.S. 335 (1963) (fourteenth amendment requires that indigent defendant in criminal trial be assisted by counsel).

[4] 384 U.S. 436 (1966) (prosecution may not use statements of the accused unless it demonstrates the use of procedural safeguards effective to secure the fifth amendment's privilege against self-incrimination).

[5] 407 U.S. 25 (1972) (accused may not be deprived of liberty as a result of any criminal prosecution in which he is denied assistance of counsel).

[6] *See Justice in the States,* in ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY, MAR. 11–14, 1971 (W. Swindler ed.).

[7] ABA PROJECT OF MINIMUM STANDARDS FOR CRIMINAL JUSTICE [hereinafter cited as ABA STANDARDS]. They provide the most meaningful and objective standards by which to measure any system of criminal justice, military or civilian. For information concerning the standards and their development, *see The Conference on the Criminal Justice Standards,* 55 JUDICATURE 355–388 (1972); Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System,* 47 NOTRE DAME LAWYER 429 (1972); Erickson, *The ABA Standards for Criminal Justice,* CRIMINAL DEFENSE TECHNIQUES, Appendix A (Cipes ed. 1972); Clark, *Why the ABA Standards?,* 33 LA. L. REV. 541 (1973).

[8] From a speech to the National Association of Attorneys General, Washington, D.C., February 6, 1970, *as quoted in* Clark, *supra* note 7. 47 NOTRE DAME LAWYER at 431.

Advisory Committees which drafted several of the Standards, Chief Justice Burger stated:

> Very early, and this means four and a half to five years ago, we came to a realization that the key to the administration of criminal justice was that there must, in every case of serious consequence be a counsel for the prosecution, a counsel for the defense, and a judge. And we likened that to a three-legged stool, or a tripod, of which you will be hearing more and more as time goes on, and we concluded that the system cannot work without all three. Like the stool or the tripod, if you can take one leg away or weaken it, you impair the entire system.[9]

Critics of the military justice system have concluded that it violates this tripod concept. Typical is this comment:

> The most important feature of the traditional military justice structure retained by the [Uniform Code of Military Justice] was "command control" of the court-martial. Command control refers to the right of an individual commander to convene a court-martial for trial of one of his men, to appoint all the personnel (including counsel and jury) from his officers, and to exert general supervisory power over the entire proceedings from pre-trial investigation to post-sentence review.[10]

While the above comment describes one facet of the military justice system, it fails to take account of the many safeguards which have caused other observers to conclude that military justice, in practice, is actually more protective of the rights of the accused than most civilian systems of criminal justice." It must be admitted, however, that military justice fails to measure up to the tripod concept recommended by Chief Justice Burger, basically because there is an insufficient separation between the prosecuting and defending functions.

In addition to the rising crime rate and the Supreme Court decisions concerning rights of an accused, another development during the Vietnam conflict focused attention on the administration of military justice-extensive litigation in the federal courts challenging various aspects of the military criminal justice system. In 1969, the Supreme Court surprised military lawyers with its decision in *O'Callahan v. Parker*,[12] which held that court-martial jurisdiction would be limited to "service-connected" offenses. Legal questions immediately arose as to the meaning of the term "service-connected."[13] Although in the

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[9] *Proceedings at the 1969 Judicial Conference, United States Court of Appeals, Tenth Circuit: Minimum Standards for Criminal Justice*, 49 F.R.D. 347, 358 (1969).

[10] Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971).

[11] *See* Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970), *reprinted in* 51 MIL. L. REV. 1 (1971). *See also* Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482 (1971).

[12] 395 U.S. 258 (1969).

[13] *E.g.*, Relford v. United States Disciplinary Commandant, 401 U.S. 355 (1971). The

closing moments of the October 1972 term a plurality of the Court concluded that the decision in *O'Callahan* would not be applied retroactively, litigation involving the meaning of "service-connected" continues.[15] In addition, the Supreme Court has now agreed to hear two cases in which lower courts have held that two punitive articles of the Uniform Code of Military Justice are unconstitutionally vague and indefinite.[16]

Paralleling and, to a limited degree, echoing the scholarly criticism and judicial challenges to the system of military justice were various Congressional proposals, Senator Birch Bayh (Democrat from Indiana) and Congressman Charles Bennett (Democrat from Florida) introduced similar legislation[17] in the ninety-third Congress seeking

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Supreme Court held that "when a serviceman is charged with an offense [in this case, rape] committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial. . . ." *Id.* at 369. Thus, such crimes are "service-connected" within the meaning of *O'Callahan*.

[14] Gosa v. Mayden, 413 U.S. 665 (1973).

[15] For examples, see Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969) (off-base possession of marijuana by serviceman "service-connected"); Schroth v. Warner, 353 F. Supp. 1032 (D. Hawaii 1973) (off-base transfer of marijuana by serviceman is not "service-connected"); Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973) (officer's off-base sale of marijuana to an enlisted man is not "service-connected").

[16] Avrech v. Secretary of the Savy, 477 F.2d 1237 (D.C. Cir.), *cert. granted*, 414 U.S. 816 (1973); Levy v. Parker, 478 F.2d 772 (3d Cir.), *cert. granted*, 94 S. Ct. 286 (1973). The cases deal with articles 133 and 134 of the Uniform Code of Military Justice which provide for punishing "conduct unbecoming an officer and gentleman," "all disorders and neglects to the prejudice of good order and discipline in the armed forces," and "conduct of a nature to bring discredit upon the armed forces."

[17] S. 987, 93d Cong., 1st Sess. (1973); H.R. 291, 93d Cong., 1st Sess. (1973). Senator Mark Hatfield (Republican from Oregon) also introduced several bills aimed at reforming military justice and administrative discharge procedures. S. 2202–2214, 93d Cong., 1st Sess. (1973). The Hatfield bills would establish judicial circuits throughout the world, but commanders would retain authority to determine whom to prosecute, subject to a judicial determination of probable cause prior to docketing a case for trial by general court-martial. For a discussion of earlier versions of these bills, see Sherman, *supra* note 10; *see also* Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455 (1971); Comment, *Beyond the Military Justice Act of 1968: Proposed Amendments to the Uniform Code of Military Justice*, 7 COLUM. J. OF L. AND S. PROB. 278 (1971); Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); Barker, *Command Influence: Time for Revision?*, 26 JAG J. 43 (1971). *Compare* Rydstrom, *Uniform* Courts *of Military Justice*, 50 A.B.A.J. 749 (1964). For background on the problem of command influence see Johnson, *Unlawful Command Influence: A Question of Balance*. 19 JAG J. 87 (1965); West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A.L. REV. 1 (1970).

Other legislation included bills by Senator Sam J. Ervin, Jr. (Democrat from North Carolina) and Congressman Bennett to ensure due process at administrative elimination proceedings. S. 2684, 93d Cong., 1st Sess. (1973); H.R. 86, 93d Cong. 1st Sess. (1973). H.R. 86 is the same as H.R. 10422, 92d Cong. 1st Sess. (1971), which passed the House of Representatives and was pending before the Senate Committee on Armed Services when Congress adjourned. This bill had the backing of the American Bar Association and the Department of Defense, but not the support of Senator Ervin. See Ervin, *Military Administrative Discharge: Due Process in the Doldrums*, 10 SAN. DIEGO L. REV. 9 (1972). See *also* Fairbanks, *Disciplinary Discharges—Restricting the Commander's Discretion*, 22 HASTINGS L.J. 291 (1971); Lynch, *The Administrative Discharge: Changes Needed?*, 22 MAINE L. REV. 141 (1970); Lane, *The Undesirable Discharge: Administrative Tool or Backdoor Court?*, 22 ARMY, NOV. 1972, at 19; NAACP SPECIAL CONTRIBUTION FUND, THE SEARCH FOR MILITARY JUSTICE 14–16, 23-24 (1971) [hereinafter cited as NAACP RE-

to provide an answer to the above-mentioned criticism of actual or potential command control of courts-martial.[18] They would establish an independent court-martial command, which would contain the judicial, defense, and prosecution functions and would take away the commander's authority to determine whom to try by court-martial. Responsibility for bringing offenders to trial would be vested in the chief of a prosecution division, roughly analogous to a United States attorney, who would be required to refer charges to trial whenever he "determines that there is sufficient evidence to convict."[19] He would also decide whether the offense should be tried in a court of limited or general jurisdiction.

Senator Bayh's bill would leave present military criminal jurisdiction intact, although it calls for a special committee to study whether to transfer jurisdiction of certain cases involving desertion and other unauthorized absences to the federal courts. The Bennett bill, however, would limit court-martial jurisdiction to military offenses and to civilian offenses if committed outside the territorial limits of the United States. Likewise, a bill by Senator Mark Hatfield (Republican from Oregon) would take away military jurisdiction over civilian and certain military offenses if committed within the United States, a territory, or possession.[20] Under the Bennett and Hatfield proposals, the offenses over which the military would no longer have jurisdiction would be tried in federal court.

In view of the many challenges to the system of military justice, there is a question whether the armed forces actually needs a separate system of justice. If it needs a separate system, a secondary question is raised, namely, whether it can measure up to the tripod concept of Chief Justice Burger and and the American Bar Association Standards for Criminal Justice.[21]

PORT]; DEPARTMENT OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 108–111(1972) [hereinafter cited as 1972 DOD TASK FORCE REPORT].

[18] See note 10 and accompanying text *supra*.

[19] S. 987, 93d Cong., 1st Sess. (1973); H.R. 291, 93d Cong. 1st Sess. (1973).

[20] S. 2213, 93d Cong., 1st Sess. (1973).

[21] There are 17 ABA Standards for the Administration of Criminal Justice: (1) Providing Defense Services, (2) Pretrial Release, (3) Fair Trial and Free Press, (4) Electronic Surveillance, (5) Discovery and Procedure Before Trial, (6) Pleas of Guilty, (7) Joinder and Severance, (8) Speedy Trial, (9) Trial by Jury, (10) Sentencing Alternatives and Procedures, (11) Probation, (12) Criminal Appeals, (13) The Prosecution Function and the Defense Function, (14) Appellate Review of Sentences, (15) Post-Conviction Remedies, (16) Function of the Trial Judge, and (17) Urban Police Function. The military clearly measures up to or exceeds many of the standards such as those on Pretrial Release, Fair Trial and Free Press, Discovery and Procedure Before Trial, Pleas of Guilty, Joinder and Severance, Speedy Trial, Criminal Appeals, Appellate Review of Sentences, and Post-Conviction Remedies. It falls short of several other standards, such as Trial by Jury, Sentencing Alternatives, and Probation, but there is no apparent opposition within the armed forces to amending the Uniform Code of Military Justice to comply with the purpose and spirit of these standards. See ANNUAL REPORT OF THE U.S. COURT OF

II. THE NEED FOR A SEPARATE SYSTEM

The traditional reasons for a separate system of military criminal justice are usually stated as follows: the need for discipline—the key ingredient of a successful army—requires a system of justice that is speedier and more certain than the civilian system. Military justice must also be responsive to the needs of the commander, able to function outside the territorial United States and able to punish certain conduct—principally insubordination and unauthorized absence—that does not violate civilian laws.[22] But some commentators make little or no attempt to justify the need for a separate system of military justice; instead, they have been satisfied to trace its historical development and to explain that "courts-martial . . . 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."[23]

In reviewing challenges to court-martial jurisdiction, the Supreme Court has generally been content to assume that a separate system of military justice is necessary. Speaking of the approach of the Supreme Court, Justice William O. Douglas has commented: "This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere. . . ."[24] An earlier Supreme Court, speaking through Justice Brewer, articulated one of the most frequently quoted reasons for special rules in the military: "An army is not a deliberative body. . . . Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."[25] Justice Harlan, in his dissent in *O'Callahan v. Parker*, listed various reasons for a separate system of military justice.[26] Among the reasons were the need to protect members from misconduct of fellow members because of the close proximity in which they must work and live, and the need to protect the reputation of the service which is impaired by misconduct that dis-

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MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE (1969, 1970, 1971, 1972)[hereinafter cited as the CODE COMMITTEE REPORTS]. See *also* 1972 DOD TASK FORCE REPORT, *supra* note 17.

[22] R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 1–7 (1956); C. BRAND, ROMAN MILITARY LAW ix–xix (1968); Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971); Nichols, *supra* note 11; JUSTICE AND THE MILITARY 1–150, 1–151 (H. Moyer, Jr. ed. 1972).

[23] W. WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d ed. 1920)(emphasis in original). *See also* G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES iv-vi (2d ed. 1909); W. AYCOCK and S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 3–15 (1955).

[24] O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

[25] *In re* Grimley, 137 U.S. 147, 153 (1890).

[26] 395 U.S. at 281.

credits the service.[27] Although it is clear that the Supreme Court will restrict the scope of court-martial jurisdiction to "the least possible power adequate to the end proposed,"[28] the Court has clearly acknowledged the legitimacy of a separate system of military justice,

Is there a need for a separate system of military justice in today's armed forces, and, if so, what kind of a system should it be? Traditionally, the *sine qua non* of success in battle has been discipline. Military justice has been justified as being necessary to the maintenance of that discipline. Yet even a cursory study of world history shows that despite the existence of military codes which permitted prompt and summary punishment of military malfeasors, nevertheless, cowardice, malingering, sitdown strikes, and mutinies have not been unknown. Examples of the latter are the refusal of Alexander's veterans to follow him into another apparently endless and useless campaign,[29] the mutiny of the Roman legions after Augustus,[30] the mutiny of the Pennsylvania and New Jersey troops in 1781,[31] the mutiny of the British Navy in 1797,[32] the refusal of the French under General Nivelle to continue a useless assault on the Hindenburg line in 1917 after suffering 118,000 casualties in two weeks,[33] and the conduct of the Italian Army at Caporetto that same year, when 50,000 were killed or wounded, 300,000 were taken prisoners, and 400,000 deserted.[34] In the light of these sobering incidents — and history records others — there is good reason to doubt the value of military justice in "enforcing" discipline in the traditional sense. A more enlightened view has been expressed by General Westmoreland, former Army Chief of Staff: "A military trial should not have a dual function as an instrument of discipline and as an instrument of justice.

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[27] Besides the Supreme Court, other civilian courts have spoken of the need for a separate system and the reasons for the need. For example, the Court of Claims emphasized a different factor in justifying the special rules governing the conduct of Army officers: "In military life there is a higher code termed honor, which holds its society to stricter accountability, and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891), *aff'd*, 148 U.S. 84 (1893).

[28] Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230–31 (1821), *as quoted in* Toth v. Quarles, 350 U.S. 11, 17 (1955). The Court indicated that a good basis for limiting court-martial jurisdiction was the fact that diversion of military manpower to try soldiers, except to maintain discipline, would interfere with the primary business of the army — fighting wars. An earlier court had said that it was the mission of armies not only to fight wars, but to win them. Hirabayashi v. United States, 320 U.S. 81, 93 (1943), *citing* Hughes, *War Powers Under the* Constitution, 42 A.B.A. REP. 232 (1917).

[29] L. MONTROSS, WAR THROUGH THE AGES 43 (3d ed. 1960).

[30] I TACITUS ANNALS §§ 16-49, in 15 GREAT BOOKS OF THE WESTERS WORLD (R. Hutchins ed. 1952).

[31] R. DUPUY AND T. DUPUY, THE COMPACT HISTORY OF THE REVOLUTIONARY WAR 422 (1963).

[32] L. MONTROSS, WAR THROUGH THE AGES 485 (3d ed. 1960).

[33] *Id.* at 726–27.

[34] *Id.* at 734.

It should be an instrument of justice and in fulfilling this function, it will promote discipline."[35]

There are others who agree with General Westmoreland's analysis. For example, a Task Force on the .Administration of Military Justice in the Armed Forces, appointed in April 1972 by the Secretary of Defense, was charged by him, *inter alia*, to "recommend ways to strengthen the military justice system and 'enhance the opportunity for equal justice for every .American service man and woman.'"[36] The Task Force, composed of nine civilian lawyers and judges and five military officers, four of whom were lawyers, served under the co-chairmanship of the General Counsel of the Sational Association for the Advancement of Colored People and an Army Commander. At the beginning of its report, the Task Force concluded:

> . . . there does exist a need in the armed forces for a system of justice, administered fairly, effectively, and promptly, to preserve and inspire adherence by all of its members to the limitations imposed upon them by law. . . . These [members] are, in the main, young Americans who are, in an all too brief a period of time, expected to be strenuously trained, equipped and taught to use dangerous and deadly weapons, deployed in foreign environments, separated from the restraining and congenial influences of family and friends, and subjected to the greatest variety of hazards, personal strains and stresses, and the simultaneous, but often unfamiliar, requirement of teamwork and unselfish sacrifice. . . . [But] no need is seen to consider the sacrifice of justice for the sake of discipline. The two are, for American servicemen, inextricable, and the latter cannot exist without the former. That is not to say, however, that the fundamental need for discipline of the armed forces can be ignored or glossed over. The services simply cannot function without it, and the country that fails to require its military forces to preserve discipline, that is, responsiveness and obedience to its lawful authority, will soon find itself defenseless, its forces turned into uncoordinated gangs and individuals. .\part from failure in its mission, the members could become a threat to the peace of the Republic they are sworn to defend.[37]

At the present time, the armed forces are suffering from racial disharmony and drug abuse as well as experiencing expression of individualistic attitudes and diversity of opinion in ways which would not have been expected or tolerated formerly. There is no choice except to cope with these problems. They must be recognized as problems, and fair, intelligent, workable solutions must be found. They cannot be eliminated by threats of severe, summary punishment. As stated by one

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[35] Westmoreland, ***supra*** note 22, at 8. An earlier version of this same philosophy appeared in the COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO THE SECRETARY OF THE ARMY (1960), chaired by LTG Herbert B. Powell [hereinafter cited as POWELL REPORT]. General Westmoreland, then a division commander, was a member of this committee.

[36] 1972 DOD TASK FORCE REPORT, ***supra*** note 17, at 1.

[37] *Id.* at 12–14.

commentator: "Commanders who resort to military justice as a substitute for their own inadequacies are barking up the wrong tree. . . . We cannot afford the smoke screen of 'easy' justice behind which poor leadership has ever flourished."[38] Furthermore, surveys of soldier attitudes reflect that they are motivated more by peer or "buddy" pressure, by pride in their unit, and by faith in their leaders than by fear of severe punishment. Also important to this motivation — which results in good discipline, high morale, and unit esprit — is the unified support of the American people.[39]

Even though discipline cannot be "enforced" by punishment alone, it is obvious that no segment of our society can function unless it has a system of criminal justice which can impose penalties with sufficient certainty and severity to deter most of its members from violating its rules most of the time. It is also clear, it seems to me, that the armed forces must have a separate system of justice for a variety of practical reasons.

The basic purpose of a system of military justice is to maintain an environment of law and order within the military unit or community so that responsible and intelligent leadership can function properly and thus achieve good discipline, high morale, and unit esprit. It must work effectively in a volunteer peacetime Army as well as in an

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[38] Graf, Only *a Leader Can Command a Company,* 21 ARMY, NOV. 1971, at 59. In October and November 1972, the aircraft carriers Kitty Hawk and Constellation were the scenes of serious incidents with racial overtones involving insubordination, sit-ins, disobedience, and assaults by dissident sailors, a majority of whom were black. A Special Subcommittee of the House Armed Services Committee found that permissiveness exists in the Navy, *i.e.* a failure to require that existing standards be met. The sub-committee found no evidence of racial discrimination but agreed that certain black sailors perceived racial discrimination. See SPECIAL SUBCOM. ON DISCIPLINARY PROBLEMS IN THE U.S. NAVY OF THE HOUSE COMM. ON ARMED SERVICES, H.A.S.C. No. 92–81, 92d Cong., 2d Sess. (1973). The Army, Air Force, and Marine Corps have experienced similar problems.

[39] Far more important in establishing discipline than the threat of severe punishment is a belief that the system of justice is fair. Pertinent is a remark of the NAACP Committee which studied the problems of black servicemen in West Germany: "If significant proportions of soldiers are convinced that military authority is illegitimate, then the military organization is seriously challenged. The equitable exercise of military justice is key to maintaining legitimate leadership and authority in the American military." NAACP REPORT, *supra* note 17, at 5. The Vanderbilt Committee observed,

> Nothing can be worse for their morale than the belief that the game is not being played according to the rules in the book, the written rules contained in the Articles of War and the Manual for Courts-Martial. The foundation stone of the soldier's morale must be the conviction that if he is charged with an offense, his case will not rest entirely in the hands of his accuser, but that he will be able to present his evidence to an impartial tribunal with the assistance of competent counsel and receive a fair and intelligent review. He is an integral part of the army, and the army courts are his system of justice. Everything that is practicable should be done to increase his knowledge of the system and to strengthen his respect for it, and if possible, to make him responsible in some particular for its successful operation. These "justice" considerations are important to a modem peacetime army as well as to a wartime army.

VANDERBILT REPORT, *supra* note 1, at 5–6.

expanded, rapidly mobilized, non-volunteer, wartime Army. An ad hoc system, which would lie dormant in the law books until triggered by a declaration of war, would be likely to result in wholesale miscarriages of justice simply because the personnel mobilized to administer it, not having had any actual experience in the administration of criminal justice in an armed force, in peace or war, would tend to over-react — particularly to incidents sounding in insubordination, including disobedience of orders.[40]

One of the principal reasons why the armed forces must have a separate system of justice is because they must be prepared to operate in areas, both in the United States and oierseas, where the civilian courts may not be functioning, or, although functioning, may be hostile to the military mission,[41] or have no interest in expending their funds for the trial and confinement of United States military personnel, particularly when the alleged misconduct affects only another member of the armed forces or United States property.[42] Another

[40] My personal observation was that some of the instances of military injustice in World War II, *i.e.* severe initial sentences for military-type offenses, occurred because the civilian lawyers who had been commissioned as judge advocates, not being experienced in military matters, gave too much weight to the commander's views of what punishment was necessary to maintain discipline in his unit. To put it another way, the lawyer was unwilling to take the responsibility for losing a battle by interjecting strong views about rehabilitating the offender when the commander believed that a sei-ere sentence was necessary to deter others. For this reason. I have serious doubts that the German system of expanding courts-martial jurisdiction in wartime is a good solution, even though plans call for a sizeable reserve of military judges who are trained in military justice matters. Krueger-Sprengel, *The German Military Legal System,* 57 MIL. L. REV. 17, 24 (1972). For what appears to be a contrary view, see Sherman, *Military Justice Without Military Control,* 82 YALE L.J. 1398 (1973). Experience in the administration of military justice in World War I1 may not be too helpful in analyzing this problem, however. as the administration of civilian criminal justice. particularly in state courts, was of a summary nature. **For** an example, *see* Brown v. Mississippi, **297** U.S. *278* (1936). Since procedures in Army courts-martial were governed to a large extent by federal rules and procedures, even with the "command influence" of World War II, courts-martial were more protective of an accused's rights than state courts. The real criminal law revolution was not felt in state courts until Gideon v. Wainwright, *3i2* U.S. 335 (1963). *See* Griswold, *The Long View,* 51 A.B.A.J. 1017 (Nov. 1965). The military justice system had been modernized by the Uniform Code of Military Justice in 1951.

[41] For example, when federal troops were used to carry out a court order permitting James Meredith to attend the University of Mississippi in the fall of 1962, one soldier was indicted by the local grand jury for tiring his weapon at students who were molesting him while he was performingguard duty. Acting under the authority of article 14 of the Uniform Code of Military Justice, 10 U.S.C. § 814 (1970), the Secretary of the Army refused the request of the local authorities that the soldier be delivered for trial by a state court. Contemplate, also, the problems that would have resulted if the U.S. forces had not had a separate system of justice when they were ordered into the Dominican Republic in 1965 or Lebanon in 1958.

[42] Although the decisions in Reid v. Covert, 354 U.S. 1 (1957), Kinsella v. Singleton, 361 U.S. 234 (1960), Grishamv. Hagan, 361 U.S. 278 (1960), and McElroy v. Guargliardo, **361** U.S. 281 (1960), concerned civilians accompanying U.S. armed forces overseas rather than military personnel themselves, they help by analogy to illustrate the problem. Those decisions abolished court-martial jurisdiction over civilians accompanying or serving with the U.S. armed forces overseas in time of peace. Severtheless, foreign countries where our troops are stationed have been reluctant to prosecute cases involving civilians who commit offenses against other United States personnel or United States property. For all practical purposes, most of these persons

reason favoring a separate system of justice, particularly in wartime, is that of manpower conservation. If a branch of the armed services has jurisdiction over offenses committed by a serviceman, it can frequently rehabilitate him for further military service without interrupting his training during the pretrial and trial phase of the case.[43]

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generally escape all punishment or receive no meaningful punishment.

In some cases, the jurisdictional gap created by court decisions has resulted in unexpected hardship. Subsequent to the decisions depriving courts-martial of jurisdiction over civilians accompanying the armed forces overseas, an American civilian employee of an armed forces contractor killed a fellow employee on Ascension Island, which was subject to British jurisdiction. The British reluctantly assumed jurisdiction. The trial judge was brought in from England, and the accused retained at his own expense a lawyer from Toronto, Canada. Two officers from the Royal Air Force and Royal Navy served as Assessors (advisors to the court on the facts). The accused's defense of self-defense was rejected and he was convicted of voluntary manslaughter and sentenced to the maximum punishment of eight years. The accused appealed his case to the court in Kenya on a written brief, because he could not afford to have his lawyer appear in person. The appellate court sustained the conviction. Thus after long delays and extraordinary expense, the accused found himself confined in Wormwood Scrubbs, a prison located outside of London, far from his relatives in North Carolina.

Similarly, no workable remedy has been found to fill the jurisdictional gaps that were created by other court decisions during the Vietnam conflict. In Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969), the court ruled that a Court-martial was without jurisdiction to try an American merchant seaman for murdering a fellow merchant seaman in DaNang in August 1967. In United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970), two of the three judges on the U.S. Court of Military Appeals ruled that a court-martial was without jurisdiction to try an Army civilian employee in Vietnam for conspiring to steal U.S. property in August 1968, because it was not time of war within the meaning of 10 U.S.C. § 802(10). Following these decisions, there were numerous other instances of U.S. civilian employees of the armed forces in Vietnam going unpunished for offenses for which members of the armed forces were regularly being tried and punished. The result was unequal treatment of those serving the armed forces; the treatment depended on whether they were drafted into the armed forces and sent to Viemam or had volunteered to work there as an employee of the armed forces or an armed forces contractor. The South Vietnam government displayed little interest in prosecuting such persons if their offense was against another .American or against U.S. property, unless the punishment was likely to be a fine.

The jurisdictional gap which received the most attention, however, was that created by Toth v. Quarles, 350 U.S. 11 (1955), holding that a former serviceman was not subject to trial by court-martial for an offense committed during his service, despite a statutory provision, 10 U.S.C. § 803(a), which would have made him amenable to trial. For all practical purposes, this decision immunized the former servicemen who were implicated in the My Lai incident. Although an argument can be made that these persons could have been tried by a military commission (including a general court-martial sitting as a tribunal for the punishment of war crimes) as provided by articles 18 and 21 of the Uniform Code of Military Justice, 10 U.S.C. §§ 818, 821 (1970), overcoming the serious jurisdictional hurdles in the face of the public opposition to the punishment of the My Lai participants would have involved lengthy litigation.

As an example of this same type of situation in the United States, the sparsely populated counties surrounding some Army posts prefer not to exercise jurisdiction in a contested case involving Army personnel because of the cost of a jury trial, although they will exercise such jurisdiction if the soldier will plead guilty and a fine is an appropriate punishment.

[43] Since O'Callahan v. Parker, 395 U.S. 258 (1969) (discussed in text at note 12 **supra),** two developments have shown the value of broad military justice powers in a conflict of the Vietnam type, *i.e.* a war lacking a Congressional declaration. Prior to *O'Callahan*, it was customary for law enforcement authorities of ports to deliver a sailor to his vessel if he was involved in a not too serious offense, as it was well known that the captain could make a proper disposition of the matter. Following *O'Callahan*, however, local authorities were reluctant to deliver offenders who were charged with "non-service-connected" offenses. Some Army personnel discovered that

The one question remaining is whether the military should *administer* its own system of justice. It would be impractical for civilian courts in the United States, even if they were functioning, to exercise jurisdiction over all offenses committed overseas. If Congress were to establish civilian courts in overseas areas, and practical and constitutional problems could be overcome, such courts might be able to function in wartime. Since they would be dependent on the military for administrative support, it is difficult to see how they would be different from similar courts composed of and administered by military personnel. It is extremely unlikely that such courts could function effectively overseas in time of peace because of the objections of the foreign countries in which our troops are stationed. While those countries with which we have status of forces agreements permit our military courts to function on the grounds that they are necessary to maintain discipline within our armed forces, experience with the consular courts indicates that these countries would consider the establishment of a United States civilian court on their soil as an infringement of their sovereignty.[44]

If the above rationale is correct, it follows that the armed forces of the United States need their own system of criminal justice in peace and in war, manned and supervised by the military.[45]

O'Callahan would permit them to delay or avoid shipment to Vietnam if they committed minor, "non-service-connected" offenses just prior to their scheduled departure date. Prior to *O'Callahan*, civilian law enforcement authorities would not file criminal charges in such cases as they did not want to interfere with personnel movements and they knew that Army authorities would make a proper disposition of the offender. After *O'Callahan,* they began to file such charges and request the military authorities to hold the serviceman for trial by civilian court, thereby interrupting his shipment. Apparently, this type of problem would not exist if Congress had officially declared war, as considerable weight was given to the fact that O'Callahan had committed his offenses in time of peace (1956). In Gosa v. Mayden, 413 U.S. 665. 693 (1973). Justice Stewart, concurring in the companion case of Warner v. Flemings, 413 U.S. 665 (1973), stated that "a serviceman who deserts his post during a time of *congressionally* declared war and steals an automobile is guilty of a 'service-connected offense." *Id.* at 693 (emphasis supplied).

[44] Rev. Stat. 4083–4130 (1878); Act of Aug. 1, 1956, ch. *807,* 70 Stat. 773. *See In re* Ross, 140 U.S. 453 (1891). See *also* Frankfurter's concurring opinion in Reid v. Covert, 354 U.S. 1, 43 (1957); J. SNEE and A. PYE, STATUS OF FORCES AGREEMENT AND CRIMINAL JURISDICTION (1957). *But* see Sherman, ***supra*** note 40.

Some countries where our troops are stationed have even objected to trials by general courts-martial (the military court of general criminal jurisdiction) on the grounds that these courts, as they have jurisdiction over civilian-type offenses, would infringe upon the sovereignty of the countries where they sit. For this reason, during the early- and mid-1960's, general court-martial trials involving offenses committed in South Vietnam or Thailand were held in Okinawa, resulting in unusual delays and expense.

[45] Of some interest in this regard is the experience of the Soviet Army. Following the Bolshevik revolution, drastic changes were made in the strict military discipline of the Czarist army, to include permitting self-government among the troops, restricting the powers of officers, introducing political commissars, abolishing the death penalty, permitting enlisted men to sit on courts-martial, and introducing a general spirit of camaraderie into the armed forces. Although the military code was tightened up to some extent in 1919 and 1925, it was not until the Soviet failure in Finland in 1940 that the Code was redrafted with a view to stricter accountability of the soldier for his acts, a de-emphasis of rights of offenders and the re-emphasis

III. THE MILITARY PROSECUTOR

Military commanders now have the authority not to prosecute men assigned to their unit, even for serious offenses, absent objection by a higher commander,[46] and to decide what court will try a case when prosecution is deemed necessary. The Bayh and Bennett legislation appears to require prosecution in all cases where there is sufficient evidence to convict, unless, with respect to a minor offense, the commander first imposes nonjudicial punishment.[47] To the extent that the legislation bars prosecutorial discretion, it is unrealistic. The administration of criminal justice, not being an exact science, must perforce give some person or tribunal broad authority to determine whether a person should stand trial and, if so, for what offense or offenses.[48]

The Bayh and Bennett legislation would give the authority to decide whether a charge should be tried by court-martial to the Chief of the Prosecution Division of a Courts-Martial Command,[49] a military lawyer who is independent of command and is responsible only to the Judge Advocate General for the performance of his duties. In cases tried at present by summary and special courts-martial, Army commanders frequently make this decision without the benefit of the advice of a lawyer. If the legislation intends the military prosecutor to have the usual prosecutorial discretion of his civilian counterpart, as he should,[50] such an approach would have the advantage of making a

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of duties, including the absolute duty of obedience. H. BERMAN and M. KERNER, SOVIET MILITARY LAW AND ADMINISTRATION (1955).

[46] General Eisenhower felt prosecutorial discretion was particularly important in wartime. *See* United States v. Fields, 9 U.S.C.M.A. 70, 74, 25 C.M.R. 332, 336 (1958).

[47] S. 987, 93d Cong., 1st Sess. (1973); H.R. 291, 93d Cong., 1st Sess. (1973).

[48] Justice Holmes observed, "What have we better than a blind guess to show that the criminal law in its present form does more good than harm. . . . Does punishment deter? Do we deal with criminals on proper principles?" O. HOLMES, COLLECTED LEGAL PAPERS 188–89 (1920).

[49] S. 987, 93d Cong. 1st Sess. §§ 830, 833(a) (1973); H.R. 291, 93d Cong., 1st Sess. §§ 830, 833(a) (1973).

[50] In the civilian community, police and prosecutors exercise broad discretion not to file a complaint or to prosecute. Chief Justice Burger has commented that "[n]o public officials in the entire range of modern government are given such wide discretion on matters dealing with the daily lives of citizens as are police officers." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE URBAN POLICE FUNCTION 2. This comment also applies to military police, although, being less experienced on the average than civilian police, they have far less discretion in this area. The ABA Standards for the Prosecution and the Defense Function recognize the wide discretion of the prosecutor: "The breadth of criminal legislation necessarily means that much conduct which falls within its literal terms should not always lead to criminal prosecution. It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act which occurs. Some violations occur in circumstances in which there is no significant impact on the community or any of its members. . . . The public interest is best served and even-handed justice best dispensed not by a mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms through the exercise of the trained discretion of the prosecutor as an administrator of justice." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE PROSECUTION FUNC-

lawyer responsible for investigating complaints,[51] evaluating the sufficiency of the evidence, and determining whether charges should be tried, and, if so, by what level of court.[52] It can be argued that an independent prosecutor would be likely to be more even-handed than a commander in his treatment of alleged offenders, *e.g.*, the prosecutor would not give preferential treatment to officers or senior noncommissioned officers or "cover up" incidents which might reflect adversely on the Army as an institution.[53] These apparent advantages are easily

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TION AND THE DEFENSE FUNCTION 93–94 (citations omitted). *See also* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 133–34 (1967); THE PROSECUTOR'S DESKBOOK 23 (P. Healy and J. Manak eds. 1971); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE URBAN POLICE FUNCTION 116–21; McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases,* 56 A.B.A.J. 1154, 1156 (1970); McIntyre, *A Study of Judicial Dominance of the Charging Process,* 59 J. CRIM. L.C. & P.S. 463 (1968).

The National Advisory Commission on Criminal Justice Standards and Goals recommends that the prosecutor establish objective screening criteria to answer such questions as "whether the prosecution would further the interests of the criminal justice system" and "whether the value to society of prosecution and conviction would be commensurate with financial, social, and individual costs." THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 144 (1973) [hereinafter cited as NATIONAL ADVISORY COMMISSION REPORT].

[51] It is clearly desirable to have a lawyer involved at an early stage in the charging process to screen out cases in which there is insufficient evidence and to insure the correctness of the charge. The question is whether it is necessary to use a lawyer independent of command or whether the commander's legal advisor, his "house-counsel," can be trusted to perform this function. In this regard, the Judge Advocate General of the Army recently announced the applicability of the ABA Standards, including the Prosecution Function, to military justice procedures, 2 THE ARMY LAWYER No. 8, at 12–13 (1972), thereby providing professional guidelines for exercise of the prosecution function by the staff judge advocate.

[52] In civilian jurisdictions the prosecutor's decision whether to charge is more or less final as grand juries tend to rubberstamp his recommendation. Helwig, *The American Jury System: A Time for Re-examination,* 55 JUDICATURE 96, 98 (1971). The Sational Advisory Commission Report recommends that a grand jury indictment not be required for any criminal prosecution. NATIONAL ADVISORY COMMISSION REPORT, *supra* note 50, at 151. In jurisdictions where the prosecutor takes his case before a magistrate, he generally has the option of asking the grand jury to indict if the magistrate discharges the accused. *E.g.*, FED. R. CRIM. P. 5.1(b). *Seegenerally,* Hodson, *Courts-Martialandthe Commander,* 10 SAN DIEGO L. REV. 51 (1972). To make it clear to the public, but particularly to the media, that an accused is not "under indictment" until a case is referred for trial, a military charge should be relabeled "a complaint."

[53] *See* Quinn, *Prosecutorial Discretwn:* **An** *Overview of Civilian and Military Characteristics,* 10 SAN DIEGO L. REV. 36 (1972). Judge Quinn, a member of the U.S. Court of Military Appeals since its creation, suggests that the broader prosecutorial discretion in the military gives the latter a greater capability for providing justice in a particular case.

As to preferential treatment, or overcharging, I have seen no evidence to indicate that commanders are more error prone than the average civilian prosecutor. Time and space do not permit a discussion of the problem of who is to file charges and make the decision to prosecute senior officers. Essentially the same problem would exist in the military in this area as exists in civilian life. For example, witness the difficulty of appointing an "independent" prosecutor in the Watergate affair. *See* Sote, *The Special Prosecutor in the Federal System:* **A** *Proposal,* 11 AM. CRIM. L. REV. 577 (1973). The authors suggest that courts should take on the task of reviewing prosecutorial discretion.

In July 1973, the President of the American Bar Association appointed a Special Committee on Federal Lau Enforcement Agencies. One of its projects is to determine whether the Attorney General, who is politically responsible to the President, ought to have the ultimate responsibility for investigating and prosecuting some types of federal crimes. 13 CRIM. L. REP. 2318 (1973).

outueighed by the disadvantages. The basic flaw, it seems to me, is that we cannot hold the commander responsible for carrying out his mission, which requires a well-disciplined unit, if we give to an independent command, albeit staffed by lawyers, the authority to maintain the kind of law and order within the unit which will encourage good discipline, high morale, and unit esprit.

In the military at present, commanders exercise broad discretion whether to prosecute. Any person subject to the Uniform Code of Military Justice may prefer charges against any other person.[54] Those charges are then forwarded to the soldier's immediate commander[55] who, after a preliminary inquiry,[56] may dismiss the charges, impose nonjudicial punishment[57] or forward the charges, together with the evidence supporting the charges, to a higher commander recommending disposition by court-martial. Each higher commander has the same alternatives, limited only to the extent that he may not direct a lower commander to prefer charges if the lower commander feels it would be inappropriate,[58] or may not "direct or recommend" that a lower commander impose nonjudicial punishment for an incident which might othenvise be handled informally.[59] The convening authority is encouraged to dismiss charges when "they are trivial, do not state offenses, or are unsupported by available evidence, or because there are other sound reasons for not punishing the accused with respect to the acts alleged."[60] The Manual for Courts-Martial pro-

Several factors operate in the military to prevent abuse of discretion: (1)the Army, Savy, and Air Force have central criminal investigative agencies whose reports are distributed to higher headquarters, making it difficult, if not impossible, for a lower commander to conceal alleged misconduct; (2)the statutory authority for a serviceman to write his congressman, 10 U.S.C. § 1034 (1970), and the frequency with which servicemen exercise this right, tends to prevent cover-up of derelictions: as in civilian life, incidents are sometimes not reported above the victim-offender level; (3) from time immemorial, one of the gauges of leadership is the court-martial rate in a unit for purely military offenses, such as insubordination or unauthorized absence. Thus commanders try to avoid courts-martial for such offenses.

A majority of the members of the DOD Task Force on the Administration of .Military Justice in the Armed Forces concluded that "systemic racial discrimination exists throughout the armed services and in the military justice system." 1972 DOD TASK FORCE REPORT, supra note 17, at 22. The NAACP Report concluded, after surveying the administration of military justice system in the U.S. forces in Europe, that "large numbers of black soldiers . . . believe that the military justice system is discriminatory and unjust." NAACP REPORT, *supra* note 17, at 5.

[54] Uniform Code of Military Justiceart. 30 [hereinaftercited UCMJ], 10 U.S.C. § 830 (1970); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 296 (rev. ed. 1969) [hereinafter cited as MCM].

[55] MCM, supra note 54, at ¶ 31.

[56] *Id.* at ¶ 32b.

[57] *Id.* at ¶¶ 32*d-f*. Nonjudicial punishment is minor punishment which can be imposed by a commanderuponamember ofhiscommand. UCMJ art. 15, 10U.S.C. § 815 (1970). *See* note 72 infra.

[58] *See, e.g.*, United States v. Rivera, 45 C.M.R. 582 (A.C.M.R. 1972).

[59] ARMY REGULATION 27–10, ch. 3, lllll 3, 4*b* (Nov. 26, 1968).

[60] MCM supra note 54, at ¶¶ 32*d*, 33*f*, 35*a*; ABA STANDARDS ON THE PROSECUTION FUNCTION, supra note 50, at § 3.9, which are applicable in the Army, set forth objective criteria for determining whether these "sound reasons" exist.

vides that the maximum punishment for the offense charged, the character of the accused, and his prior service should be considered in reaching a disposition of the charges.[61] This procedure, including the recommendation at each echelon of command, is designed to ensure proper exercise of broad prosecutorial discretion so that charges will be handled at as low a level as is consistent with appropriate and adequate punishment.[62]

Allowing the commander to decide whom to try by court-martial is consistent with the concept that a commander cannot be held responsible for mission accomplishment unless he is given the necessary resources and authority. As a law-abiding environment is essential to good discipline, without which the unit cannot hope to succeed, it follows that the commander must have sufficient authority to enable him to maintain the required degree of law and order.[63] To use a civilian analogy, the electorate should not hold a mayor or a governor responsible for a breakdown of governmental functions caused by a breakdown in law and order unless he has been given adequate resources for law enforcement and authority to influence the police and prosecutors to perform their duties properly.

Another flaw in the Bayh proposal is that it would split the respon-

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[61] MCM *supra* note 54, at ¶¶ 32*b*, 32*f*(4)(*d*), 33*b*.

[62] *Id.* at ¶ 30*g*.

[63] The Supreme Court has arrived at this same conclusion in determining that a civilian-type offense committed by a soldier on a military post in peacetime is "service connected," thereby subjecting the offender to trial by court-martial. Justice Blackmun, speaking for a unanimous Court, said:

> We stress: (a) The essential and obvious interest of the military in the security of persons and of property on the military enclave. . . . (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. . . . (c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's sentry security. has upon morale, discipline. reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission. . . .

Relford v. Commandant, 401 U.S. 355, 367 (1971).

With respect to international matters, an earlier Court had gone even further. In considering the responsibility of a wartime commander for atrocities committed by his troops, the Court concluded that "[the provisions of the Hague Conventions and the 1929 Geneva Convention] plainly imposed on the petitioner . . . an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." *In re* Yamashita, *327* U.S. 1, 16 (1946). The military commission which condemned General Yamashita delivered a brief explanation for its findings: "Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. . . . It is for the purpose of maintaining discipline and control. among other reasons, that military commanders are given broad powers of administering military justice. . . ." Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy,* 5 AKRON L. REV. **43,** 60 (1972). Professor Taylor. who teaches Constitutional Law, had suggested in his book, T. TAYLOR, NUREMBERG AND VIETNAM AN AMERICAN TRAGEDY (1970), that the My Lai cases should have been tried by military commission, apparently because of his dissatisfaction with the fact that courts-martial are limited to a consideration of the specificoffenses and offenders before them; in a sense, he feels that war crimes, even when committed by U.S. troops, will not be adequately tried by a court-martial because the accused has too many protections. Solf, *supra* at 65-68.

sibility for the administrative management of soldiers, including their reassignment or their administrative discharge, from the responsibility of deciding whether they should be prosecuted. When a soldier is alleged to have committed an offense, the basic question presented is what is the best disposition to be made of him, considering his prior record, his ability and training, the nature of the offense and its impact on discipline, and the nature of the unit's mission. The responsibility for providing an answer to this question should not be divided between two people, one who has an overall responsibility for creating and maintaining discipline, and the other who has no responsibility except to consider the nature of the offense and to determine whether the evidence will support a trial by court-martial. The proposed split of responsibility means that neither the commander nor the prosecutor will be able to consider all of the alternatives that should be available in determining the best disposition of the matter.[64] An inherent conflict between these two decision-makers is bound to result, not necessarily because they disagree, but because neither person has access to sufficient data to make an informed disposition. Law enforcement is a difficult job under the most favorable circumstances, that is, when all its aspects, from police selection and training through the judicial process to correction and rehabilitation, are carefully coordinated. To split, deliberately, the responsibility for law enforcement in the military is to plan for failure.

The Bayh proposal is also faulty in its assumption that the best way to improve military justice is to make it more like civilian criminal justice. There is little support for this assumption.[65] Although several billions of dollars have been pumped into state law enforcement agencies in the last few years, the crime rate is still high.[66] An examination of the commentaries supporting the American Bar Association Standards of Criminal Justice reflects a civilian criminal justice system that needs drastic overhauling in many of the states if it is to serve either society or the accused.[67]

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[64] ABA STANDARDS OS THE PROSECUTION FUNCTION, *supra* note 50, at § 3.8, and NATIONAL ADVISORY COMMISSION REPORT, *supra* note 50, at ch. 6, strongly recommend that consideration be given to non-criminal disposition of offenders in appropriate cases.

[65] Professor Karlen, the Director of the Institute of Judicial Administration during its management of the ABA project to develop standards for criminal justice, feels that changing military justice to make it conform to existing civilian criminal justice would be a step backward. Karlen, *Civilianization of Military Justice: Good or Bad,* 60 MIL. L. REV. 113 (1973).

[66] FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS (1971) (1972).

[67] 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 nith 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).

Anthony G. hmsterdamof the Stanford University law faculty has suggested the urgent need to appraise civilian criminal justice, not by a discussion of rights the criminal has but by

My judgment as to who should exercise prosecutorial discretion in the military is, of course, subjective. My experience has been that the senior commanders who exercise court-martial jurisdiction are generally fair-minded men of integrity. Civilian lawyers who defend criminal cases in both military and civilian courts have told me that commanders are no more guilty of "overcharging" than many civilian prosecutors. On balance, I would leave the decision to prosecute with the commander, but only after he has received the advice of his legal advisor. Further, his legal advisor's determination that the expected evidence is insufficient to establish a prima facie case should be binding on the commander. If it is decided to file charges with a court, the legal advisor would be responsible for providing prosecution counsel. The result would be that the commander's legal advisor would perform duties similar to those of an attorney general of many states; he would not only be the legal advisor to the commander (similar to a governor), but he would also be responsible for prosecution of cases in the command (similar to a state). Adequate protection to the accused would be provided by a probable cause hearing before an independent magistrate,[68] representation by an independent legal counsel,[69] trial by a randomly selected jury presided over by an independent judge,[70] and, in the event of conviction, appellate review by independent, impartial tribunals.[71] In my view this system would best serve the accused and the armed forces.

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examination of the treatment he actually gets. Amsterdam, *We Have Two Kinds of Justice–One for the Poor and One for Us*, II INTELLECTUAL DIGEST, Aug. 1972, at 49. The well-known writer John Hersey. after studying the administration of criminal justice in New Haven, commented in a letter to the Forum for Contemporary History,

> I have presumed to write such a letter as this only because of my novelist's sense of what happens to *all* the human beings, judges included, in the ambiance of court-oriented criminal justice, with its atmosphere of pragmatism, of getting the job done in the crudest but quickest way; with, in the end, its cynicism, its assumption that riffraff are probably guilty; its lesson to the accused poor that justice is a matter of wheeling and dealing, of influence ("I can get you a suspended sentence if you'll cop the plea"), and so of copping out, playing the game, fitting in with the system's requirement that the job of the courts be done, above all, with dispatch. The noble ideal, "innocent until proved guilty," gives way to a corrupt and crime-feeding one, "let off easy if copped as guilty."

Hersey, *The Pit*, III INTELLECTUAL DIGEST, NOV. 1972, at 92–93.

If the courts or the Congress deprive the military of authority to administer criminal justice, they may not be doing the military accused any favor, as his rights are uniformly better protected in military courts than in civilian courts. See the articles collected at Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 n.2 (1972); THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (H. Jones ed. 1965); Karlen. *supra* note 65.

[68] Section 832 of the Bayh and Bennett legislation would provide for a probable cause hearing before a military judge who is responsible for the performance of his duties to the Judge Advocate General of his service.

[69] See Part IV, The Military Defense Counsel, p. 597 *infra*.

[70] See Part V, The Military Trial Judge, p. 601 *infra*.

[71] Such a review is now provided for cases involving a general officer or a sentence to death, dishonorable or bad conduct discharge, or confinement for one year or more. UCMJ art. 66, 10

There is an additional assumption in the Bayh and Bennett bills which warrants brief comment; that is that a military lawyer who is independent of command would make a better prosecutorial decision than a military lawyer who is the legal advisor of a commander. Presumably, both lawyers would come from the same legal corps and both would have about the same experience and training. However, one would spend full time as a prosecutor, whereas the other would be involved only in those cases arising in his command. There is some danger that the full-time prosecutor might be rated for promotion purposes on his conviction rate, as there would be little else to consider in judging his capabilities and potential. Under these circumstances, I am nor persuaded that the full-time prosecutor will make the better decision, if this means a decision that best balances the rights of the accused against the needs of the military community.

IV. THE MILITARY DEFENSE COUNSEL

Free legal counsel is provided to the military accused at all stages of a case, from initial interrogation through appellate review, without regard to his financial circumstances.[72] It seems, therefore, that the defense leg of Chief Justice Burger's tripod is a strong one in the military, being even more protective of the accused than the ABA Standards, which would provide free counsel only to a person "who is financially unable to obtain adequate representation without substantial hardship to himself or his family."[73] But the military system

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U.S.C. 6866 (1970). There is no provision for a review of other cases by a judicial tribunal. The Bayh and Bennett legislation at sections 869 provide that such cases be reviewed by the Judge Advocate General. For an alternate proposal, see note 104 infra.

[72] 10 U.S.C. § 832 (preliminary investigation), §§ 827 and 838 (trial by general or special court-martial), 8870 (appeal); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (custodial interrogation); United States v. Adams, 18 U.S.C.M.A. 439, 40 C.M.R. 151 (1969) (line up). It is a general rule in all the services that an accused may confer with free legal counsel before he decides to accept nonjudicial punishment from his commander under UCMJ art. 15, 10 U.S.C. §815 (1970). As acceptance of such punishment, except on shipboard, is similar to the civilian practice of "forfeiting collateral," it is clear that the services are more liberal in affording free counsel to the accused than the ABA Criminal Justice Standards, which provide for counsel "in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed. . . ." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 84.1. Of course, this provision of the standards must now be construed in light of Argersinger v. Hamlin, 407 U.S. 25 (1972), holding that absent a knowing and intelligent waiver imprisonment may not be imposed unless the accused is represented by counsel at his trial. The **Argersinger** guideline was adopted by the military for trials by summary courts-martial (which can impose one months confinement) in United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973). In Daigle v. Warner, 490 F.2d 358 (9th Cir. 1973), the court held that the sixth amendment right to counsel does not apply to trials by summary courts-martial but due process will require counsel if one is necessary to enable the accused to present some defense **or** mitigation.

[73] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROVIDING DEFENSE SERVICES, supra note 72, at 66.1. As the lowest ranking enlisted man in the Army now receives more than $3,900 per year ($4,300 after four months' service), plus clothing,

suffers from the fact that the free counsel is an officer who is usually assigned by the convening authority from the office of the staff judge advocate, which also provides prosecution counsel.[74] Thus the practice appears to violate the spirit, if not the letter, of section 1.4 of the ABA Standards for Roviding Defense Services, which requires that a defense lair yer have professional independence and be "subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice."[75]

The deficiencies of the above military practice can be summarized as follou s: (1) A client may have less confidence in a law yer assigned by the convening authority than he uould in an independently assigned law yer;[76] (2) a counsel may have less confidence in his own independence than he would if he owed no obligation to the command staff judge advocate, who, for all practical purposes, is in charge of the prosecution;[77] (3) the convening authority can assign the "too successful" defense counsel to the prosecution or to duties other than defense work;[78] and (4) counsel may prosecute one day and defend the next, performing disparate duties which require handling of police and criminal investigators in radically different ways.[79]

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rations, quarters, medical care, and related benefits, it is possible that many military accused might not qualify for free counsel under the Standards, particularly as they may continue to draw their pay until completion of appellate review following their conviction.

[74] Although a staff judge advocate has many other legal duties (*e.g.*, he serves as General Counsel for his commander) in the criminal law field, he performs duties somewhat similar to those of a U.S. District Attorney, in that he is responsible for investigation and trial of criminal cases. For a discussion of the problems presented by this practice, *see* hlurphy, *The* Army *Defense Counsel: Unusual Ethics for an Unusual* Advocate, 61 COLUM. L. REV. 233 (1961); Willis, *supra* note 67, at 48-49 n. 121.

[75] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 1.4. The Bayh and Bennett legislation provide that a "military defense counsel may, at any time, at Government expense, seek such collateral relief as he deems necessary to protect the rights of the accused in any court having jurisdiction to grant such relief." S. 987, 93d Cong., 1st Sess. §833(c) (1973); H.R. 291, 93d Cong., 1st Sess. §833(c) (1973). If legislation were enacted to give military courts all-writs power, and permitted petitions for writs of certiorari to the Supreme Court, both of which have been proposed, such collateral attacks would be unnecessary. See CODE COMMITTEE REPORTS, *supra* note 21, at 20–21 (1970), 21–22 (1971). In the interim, a military lawyer in the Army may act as counsel in a collateral attack in the federal courts only with the approval of the Judge hdvocate General. Provisions for requesting this approval authorize the requesting counsel to seek the support of the Chief of the Defense Appellate Division on a privileged basis. ARMY REGULATION 27–40, ¶¶ 1–4 (June 17, 1973). Such collateral attacks during the pendency of proceedings are usually unsuccessful because of the exhaustion of remedies doctrine. Gusik v. Schilder, 340 U.S. 128 (1950); Soyd v. Bond, 395 U.S. 683 (1969). *Bur see* Parisi v. Davidson, 405 U.S. 34 (1972).

[76] I 1972 DOD TASK FORCE REPORT, supra note 17, at 81; NAACP REPORT, supra note 17, at 13. The NAACP report finds, however, that black soldiers in Germany distrust profoundly all legal counsel available to them, whether judge advocate officers or civilian lawyers and that "white JAG officers have 'zero credibility.' "

[77] *See* Willis, supra note 67, at 48–49 n.121.

[78] R. RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW 264 (1970).

[79] A.B.A. STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSBILITY, OPINIONS NO. 1235 (1972) [hereinafter cited as A.B.A. OPINION 1235].

The military practice has recently drawn criticism. The Standing Committee on Ethics and Professional Responsibility of the American Bar Association, after considering the manner of furnishing military defense counsel in the Coast Guard, urged that whenever possible, trial and defense counsel should be afforded different facilities, should answer to different superiors, and should be assigned either as a prosecutor or defense counsel while assigned to one command.[80]

The 1972 Department of Defense Task Force Report on the Administration of Military Justice in the Armed Forces recommended that "[a]ll judge advocate defense counsel be placed under the direction of the appropriate Judge Advocate General. . . ."[81] In response to this recommendation, the Secretary of Defense directed the military departments to "submit plans to revise the structure of the judge advocate organization to place defense counsel under the authority of The Judge Advocate General."[82]

As early as October 1972, the Air Force had assigned its defense counsel for general courts-martial (the court of general criminal jurisdiction) to the Air Force's trial judiciary division, which operates under the supervision of the Air Force Judge Advocate General. In the light of the 1972 DOD Task Force Report and the directive of the Secretary of Defense, the Air Force began to implement an Area Defense Counsel Program in January 1974. Under this program, all defense counsel would be assigned to the Appellate Defense Division of the Office of the Air Force Judge Advocate General, would be located in separate facilities on each base, and would perform their duties under the professional supervision of chief circuit defense counsel in each judicial circuit. The circuit defense counsel would be supervised by the Chief of the Appellate Defense Division. Area defense counsel would be responsible for defending in special court-martial cases, counseling the accused in Article 15 cases, and defending respondents in administrative proceedings which may result in adverse personnel action.[83]

In response to the directive of the Secretary of Defense, the Army and the Navy have also submitted plans for an independent defense corps. The Army plan is similar to that of the Air Force, *i.e.* there

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[80] *Id.*

[81] 1972 DOD TASK FORCE REPORT, **supra** note 17, at 124–25.

[82] Secretary of Defense Memorandum, Subject: Report of the Task Force on the Administration of Military Justice in the Armed Forces, Jan. 11, 1973.

[83] 12 AIR FORCE JAG REPORTER § B (Dec. 1973). The Air Force was better able than its sister services to furnish defense counsel for general courts-martial from a central office, not only because of the availability of in-house air transport, but also because its caseload is small. For example, for the fiscal year ending June 30, 1972, the Air Force had only 162 general courts-martial, compared to 2217 in the Army and 873 in the Navy. The Coast Guard had *six*. The figures for special courts-martial are comparable: 2245 for the Air Force, 16,613 for the Army, 9796 for the Navy, and 167 for the Coast Guard. CODE COMMITTEE REPORTS (1972), *supra* note 21.

uould be a separate defense corps, organized by Army judicial circuits, and serving under the professional supervision of a chief defense counsel who would be responsible to the Judge Advocate General. Prior to implementing the plan, however, the Army has directed that offices of defense counsel will be "visibly separate" from those of staff judge advocates and prosecution counsel.[84] This was followed by a strongly worded directive of the Army Judge Advocate General to all staff judge advocates, advising them that, pending action by the Secretary of Defense on the separate defense corps concept, they should raise the competence and independence of their defense counsel by training, by establishing a fixed pattern of rotation of counsel, by designating a chief defense counsel who would supervise other defense counsel and would be responsible only to the staff judge advocate or his deputy, and by providing facilities for defense counsel which can be identified as separate by the military public.[85]

The Navy plan for a separate defense corps, scheduled for implementation on July 1, 1974, generally provides that all trial personnel, to include the judge and counsel for the prosecution and defense, will be assigned to Navy Legal Services Offices throughout the world, each of which will have a judge advocate as the officer in charge. The latter will perform his duties under the professional supervision of the Savy Judge Advocate General. In a sense, the Navy plan conforms rather closely to the organization proposed by the Bayh and Bennett legislation.[86]

The chief obstacle to the implementation of a separate defense corps in the Army and the Navy is the need for additional judge advocate personnel to staff the separate organization; there is also a shortage of experienced defense counsel to serve in a professional supervisory capacity. Increased use of paralegal personnel to assist both prosecution and defense counsel is being emphasized in the Army as a means of alleviating this shortage.

.Although the military services and their Judge .Advocates General are acting in good faith in attempting to improve the quality and independence of defense counsel, it is apparent that the shortage of judge advocates, particularly experienced judge advocates, will delay the establishment of worldwide separate defense corps in the Army and the Navy.[87] Until such an independent corps is created, the

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[84] Letter, Department of the Army, Subject: Support for Military Legal Counsel, June 15. 1973.

[85] Letter, Office of The Judge .Advocate General, Department of the Army, Subject: Providing Adequate Defense Services—The Defense Counsel, August 24, 1973.

[86] Information about the Navy plan was furnished informally on .March 5, 1974, by the officer-in-charge of the Navy-.Marine Corps Judiciary Activity.

[87] *See* note 83 ***supra.*** H.R. 4606, 92d Cong., 1st Sess. (1971), would have solved, or assisted in solving, this shortage problem by providing professional pay for military lawyers similar to that provided for military doctors. .Although this bill passed the House of Representatives unani-

defense leg of Chief Justice Burger's tripod must rely for its strength on the professional integrity of the young military lawyers who serve in the trial defense role. As in the past, there is evidence that they will perform their duties in a professionally independent manner and will not allow themselves to be intimidated or cowed by either the actual or supposed harassment of a military superior.[88]

V. THE MILITARY TRIXL JUDGE

Since it came into being in 1951, the United States Court of Military Appeals has striven to ensure the judicial independence of the military trial judge, even though he was, for a long period of time, a member of the convening authority's command and a member of the office of the staff judge advocate of the convening authority. In one of its early opinions, the court declared that the law member's (predecessor to the law officer and to the military judge) position with respect to a court-martial is "closely analogous to that of the judge in the criminal law administration of the civilian community. . . . He is the court-martial's advisor and director in affairs having to do with legal rules or standards and their application."[89] Two years later the court emphasized its intent "to assimilate the status of the law officer wherever possible, to that of a civilian judge of the Federal system."[90] Thus it came as no surprise to have the court clothe the law officer with the power to declare a mistrial in a proper case, despite a lack of authority therefor in the Uniform Code of Military Justice or the Manual for Courts-Martial.[91] The Military Justice Act of 1968 created a trial judge who was divorced from the commander who convened the court-martial presided over by the judge.[92] Because he has judicial

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mously, the Congress adjourned before it could be considered by the Senate. Legislation has been enacted by the Ninety-Third Congress which will help, but not solve the shortage problem, by permitting each service to send 25 officers per year to law school. Pub. L. *So.* 93–155, §817 (Nov. 16, 1973) (U.S. CODE CONG. & AD. NEWS 4136, to be codified at 10 U.S.C. §2004).

[88] The 1972 Department of Defense Task Force reported:

> [S]ome defense counsel stated to the Task Force that they have been harassed by their commanders and even, in some cases, by their staff judge advocates when they have zealously defended cases of particular interest to the command. Some defense counsel felt that, because they had conducted successful defenses in a number of cases of special interest to the commander, they were reassigned to less desirable duties within the office of the staff judge advocate. Undoubtedly, such pressure has occurred from time to time, but it appears not to be pervasive.

II 1972 DOD TASK FORCE REPORT, *supra* note 17, at 66-67.

[89] United States v. Berry, 1 U.S.C.M.A. 235, 240, 2 C.M.R. 141, 146 (1952).

[90] United States v. Biesak, 3 U.S.C.M.A. 714, 722, 14 C.M.R. 132, 140 (1954).

[91] United States v. Richard, 7 U.S.C.M.A. 46, 21 C.M.R. 172 (1956). For discussions of the court's development of the independence of the law officer, see Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39 (1959); Cretello and Lynch, *The Military Judge: Military or Judge?*, 9 CALIF. WESTERN L. REV. 57 (1972).

[92] Act of Oct. 24, 1968, Pub. L. No. 90–632, 82 Stat. 1335. Ths court exercised an early

independence, training and experience, and the firm support of the United States Court of llilitary Appeals, the military trial judge is clearly a strong leg on our tripod **of** justice. However, there have been suggestions that the trial judge, although independent of command, lacks many ofthe judicial powers of his civilian counterpart.[93] He has only a limited contempt power.[94] He does not ha\-e a broad sentencing power.[95] He has little, if any, authority to grant extraordinarv relief, as he is appointed to preside over trials on a case-by-case basis. Lacking a continuing jurisdiction, it would be infeasible for him to exercise an "all-writs" power similar to that permitted a federal trial judge.[96] The Code Committee Reports for 1969, 1970, 1971, and 1972 indicate that legislative proposals are being considered which would give the trial judge increased authority in the contempt, sentencing, and extraordinary relief areas.[97] Similarly, the Bayh and Bennett proposals pro\-ide for increased powers of rhe military trial judge in these three areas.[98]

The above proposals would improve the administration of criminal justice in the military. With the advent of the newlv approved ABA Standards of Judicial Administration, however, the organizational structure of the military judiciary, from top to bottom, should be studied to see if it can and should conform to those standards. A cursory comparison of those standards with the existing military judiciary shows that there are significant differences between the present military judicial organization and the unified court system and unified court structure envisioned by sections 1.10 and 1.11 of the new standards.[99] A brief discussion of some of those differences follows.

The Military Justice Act of 1968[100] established in each service a separate military trial judiciary, whose members are assigned to and directlv responsible to the Judge .Advocate General of their service.[101]

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opportunity to strengthen the authority of the newly created military trial judge by opining that the military judge, not thecommander who convened the court. was authorized to determine the proper place oftrial. United States v. Williams, 21 U.S.C.M.A. 420, 45 C.M.R. 194 (1972).

[93] CODE COMMITTEE REPORTS (1970), (1971), (1972), *supra* note 21; Hodson. *Perspective–The Manual for Courts-Martial–1984*, 57 MIL. L. REV. 1 (1972); Cretello and Lynch, *supra* note 91.

[94] UCMJ art. 48, 10 U.S.C. §848 (1970).

[95] UCMJ art. 51, 10 C.S.C. §851 (1970). The military judge may impose the sentence in a non-capital case only if the accused has requested trial by judge alone. If the trial is by court members, they. not the judge. impose the sentence.

[96] 28 U.S.C. §1651 (1970).

[97] See legislation cited in note 19 ***supra.***

[98] S. 987, 93d Cong., 1st Sess. § 826(b)(1973); H.R. 291, 93d Cong., 1st Sess. § 826(b)(1973).

[99] ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO COURT ORGANIZATION, as approved by the ABA House of Delegates at its midwinter meeting in February 1974.

[100] Note 92 *supra.*

[101] UCMJ art. 26(c), 10 C.S.C. §826(c) (1970). *Seealso* UCMJ art. 6. 10 U.S.C. *$5806.* 3037

It also created a Court of Military Review for each service, whose members are likewise directly responsible to their respective Judge Advocate General.[102] .Although these trial and appellate judges are free of the influence of commanders in the field, they do not have the independence and tenure suggested by the new ABA Judicial Administration Standards Relating to Court Organization. The present military judicial organization would be similar to the federal judiciary if the federal judges performed their duties under the direction and supervision of the Attorney General, or similar to a state system if state trial and appellate judges served under the direction of the attorney general of the state. Further, certain quasi-judicial functions are performed by the Judge Advocate General,[103] with the result that legal opinions on questions arising in court-martial trials are issued, not only by trial and appellate judges, including the judges of the Court of the Military Xppeals — the supreme court of the military — but also by the Judge Advocate General of each service. This judicial system is a far cry from the unified organization prescribed by the ABA Court Organization Standards.[104]

(1970), which provide, with respect to the Army, that the Judge Advocate General shall direct judge advocates (military lawyers) in the performance of their duties. The effect of this statute is ameliorated by UCMJ art. 37, 10 U.S.C. $837 (1970), providing, in effect, that no one subject to the UCMJ shall interfere with or influence the performance of a judicial function under the UCMJ. A violation is punishable under UCMJ art. 98, 10 C.S.C. $898 (1970).

[102] UCMJ art. 66, 10 U.S.C. $866 (1970). The court, an intermediate appellate court, has fact-finding power with authority to mitigate or commute the sentence if found to be inappropriate.

[103] UCMJ art. 69, 10 U.S.C. §869 (1970). Amongother powers, the Judge Advocate General of each service may grant postconviction relief to persons convicted by courts-martial whose cases were not reviewed by a Court of Military Review. Under the same article, the Judge Advocate General is authorized to refer certain cases to the Court of .Military Review, *i.e.* grant the accused the right to have his case considered by the court.

[104] In addition to the commander's corrective power under UCMJ art. 15, 10 C.S.C. §815 (1970), the military has a three tiered trial court system, consisting of summary, special, and general courts-martial. UCMJ art. 16, 10 U.S.C. $816 (1970). The ABA Judicial Administration Standards relating to Court Organization § 1.10, recommends a single trial court of general jurisdiction. A similar recommendation had been made by the POWELL REPORT, ***supra*** note 35, which, in 1960, had recommended abolition of the summary and special courts-martial. Both the Bayh and Bennett legislation would eliminate the summary court-martial, Senator Bayh favoringretentionof the present generaland special court-martial, S.987, 93d Cong., 1st Sess. $8816, 818, 819 (1973), and Congressman Bennett favoring an "upper" and "lower" court, with a rather bizarre division of jurisdiction. For example, the "upper" court could try forgery, but not larceny; the "lower" court could try larceny but not forgery. In both instances they would have jurisdiction over these and other civilian-type offenses only if they were committed outside of the United States. See H.R. 291, 93d Cong., 1st Sess. §§816, 818, 819 (1973).

While consideration should be given to a unification of the trial court structure, it is also important that the highly fragmented appellate structure of the military be studied to see if it should conform to the ABA standards. In addition to the quasi-judicial powers now exercised by the Judge Advocate General, see note 103 ***supra,*** the convening authority of each court-martial performs an initial legal review of the record and determines the legal sufficiency of the findings and the sentence. UCMJ arts. 60–64, 10 U.S.C. §§860–64 (1970). Records which involve a general officer, death, or punitive discharge or confinement for one year or more are then forwarded for appellate review by the Court of Military Review. UCMJ art. 66, 10 U.S.C. §866

An additional weakness of the military judicial system is the lack of statutory provision for a military judicial conference or council or for the Court of Military Appeals to promulgate uniform rules for the administration of military justice.[105] Clearly, with the advent of the new Judicial Administration Standards, the military justice system should be surveyed objectively and analytically to determine whether it can or should measure up to those standards which are designed to establish a court system to "serve the courts' basic task of determining cases justly, promptly, and economically."[106] Surely, the military cannot quarrel with this objective.

VI. CONCLUSION

Since the Military Justice Act of 1968 was enacted, the services have continued to expand the responsibility of military judges and to search for ways to provide more independent, more experienced prosecutors and defense counsel. All services have adopted, so far as they are applicable, the American Bar Association Standards for Criminal Justice. Unquestionably, however, legislation is needed to permit further modernization of the system. It is unreasonable to think that there could be a revolution in civilian criminal justice without its having an impact on military justice. Paradoxically and unknown to many of its severist critics, the military has been in the vanguard of

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(1970); *MCM*, supra note 54, at para. 91*f*. General court-martial records not involving a general officer. death. or punitive discharge or confinement for one year are forwarded for review by the Judge Advocate General. UCMJ art. 69, 10 U.S.C. §869 (1970). Other records of trial (those by summary court and those by special court not involving a bad conduct discharge) are reviewed by a judge advocate. usually one on the staff of the commander who exercises general court-martial jurisdiction. UCMJ art. 65*c*, 10 U.S.C. §865*c* (1970). The commander exercises one other important appellate judicial function: he acts on prosecution appeals from a ruling by the trial judge dismissing a specification. UCMJ art. 62*a*, 10 U.S.C. §862*a* (1970). While the prosecution should be authorized to appeal certain interlocutory rulings of the trial judge, ABA Standards relating to Criminal Appeals §1.4, the determination of such an appeal should be made by a tribunal which is a part of the independent, unified judiciary.

[105] *See* ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO COURT ORGANIZATION §§1.11, 1.30, 1.31, 1.32, 1.33. In the military, uniform rules are prescribed by the President under UCMJ art. 36, 10 U.S.C. §836 (1970). Chief Judge Quinn of the Court of Military Appeals has suggested that the court should have rulemaking power. Quinn. *Courts-Martial Practice*, 22 HASTINGS L.J. 201, 203 (1971). The nearest analogy to a military judicial conference is the Code Committee, which consists of the three judges of the Court of Military Appeals and the Judge Advocates General of all services. UCMJ art. 67, 10 U.S.C. 8867 (1970). If a military judicial conference were prescribed by statute, it should include not only appellate and trial judges, but perhaps also the Judge Advocate General of each service. However, *see* 28 U.S.C. §331 (1970), which establishes the Judicial Conference of The United States and provides that the Attorney General, who is not a member of the conference, shall, upon request of the Chief Justice, make a report. The Judge Advocate General has powers and responsibilities similar in many respects to the Attorney General.

For a brief but informative discussion of the Judicial Conference of the United States. see Myers, Origin *of the Judicial* Conference, 57 A.B.A.J. *597* (1971).

[106] ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO COURT ORGANIZATION §1.00.

this criminal law revolution, and thus has fewer changes to make to modernize itself than many of our states. Because the military has proved that it is capable of administering a system of military justice that fairly protects the rights of the accused and is willing to make even further evolutionary changes in that system, national security should not be jeopardized by an overreaction to the incessant clamoring of a few critics, several of whose writings reflect a lack of objectivity. Fortunately, as in the past, Congress will provide the armed services with an opportunity for a fair hearing before changes are made. Legislation will undoubtedly be enacted to strengthen the authority of the military judge, the independence of defense counsel, and to a certain extent the independence of the appellate courts. As a minimum, this legislation should provide that (1) military juries be randomly selected; (2) military judges of general courts-martial (as well as military appellate judges) be appointed by the President to permanent courts for a term of years, be empowered to issue extraordinary writs in support of their authority in the administration of military justice, be authorized to impose sentences, including probation, in all except capital cases, and be given broadened contempt power; (3) a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence; (4) an accused who has exhausted his military remedies by appeal to the Court of Military Appeals, be permitted to petition the Supreme Court for a writ of certiorari; (5) defense counsel be made as independent of command as possible under the circumstances and be given a fair opportunity to compete for promotions; (6) adequate administrative and logistical support be provided to permit the military judiciary to function independently and efficiently; and (7) commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty.

If these changes are made, no one should claim that courts-martial are "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."[107] Rather, the courts-martial would be a viable part of a modern judicial system, operating under the judicial umbrella of the Supreme Court of the United States. It should be unnecessary to go further and take the undesirable step of removing the prosecution function from the commander and his legal advisors, as the Bayh and Bennett legislation would do, or to limit further the subject matter

[107] WINTHROP, **supra note 23, at 49.**

jurisdiction of the courts. Rational allocation of the prosecution, defense, and judicial function would give the military a criminal justice system in nhich both commanders and accused can have confidence.

In brief, although the three legs of Chief Justice Burger's tripod of justice are sounder and as equal in strength in the military as they are in civilian criminal justice systems, there is a need to improve the experience of counsel for both sides, a need to give the defense counsel additional independence, a need to modernize the military judicial structure and its procedures, and a need to augment the military criminal justice system with adequate supporting personnel, services, and facilities in order to make the most effective use of military lawyers and judges.