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MILITARY JUSTICE: THE NEED FOR CHANGE

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The cover flap of a well-known, recently published condemnation of military justice relates the following:

Every year 100,000 Americans in uniform find themselves facing court-martial. They get no bail, no trial by peers, no guarantee of an impartial judge, no due process. Ninety-five percent of the defendants are convicted, for military justice is prefabricated according to the wishes of the local commander, and trial is tantamount to a verdict of guilty.¹

The quote is superficial and misleading, obviously directed more at the sale of books than at the revelation of the truth about military justice. It is valuable, however, in that it capsulizes the layman's general attitude and conceptions concerning the system of discipline and justice within the military.

The lack of objectivity with which an appraisal of military justice is generally approached is perhaps attributable to the human tendency to impose guilt by association, a concept which is anathema to any system which prides itself on its ability to deal equitably. Thus, the temptation to indulge one's hostility to the military in general, its goals, and the foreign policy of the country seems constant in discussing military justice. Such indulgence denies the opportunity for objectivity, and has no place in an analysis of a legal system.

The other major factor to which I attribute the many extant mis-

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1. R. SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1969).

conceptions concerning military justice is the tendency of journalists, writers, and commentators to focus their concern on particularly unique cases within the military. While this may be natural and is quite understandable, the notoriety which attaches to these cases does little to create an atmosphere conducive to an objective appraisal of the entire system. Like any system of criminal justice, the substance and procedure of military law can be fairly appraised only by an analysis of its daily workings. In 1969, in the Army alone, there were 76,320 courts-martial.² To judge such a system on the basis of the "Green Beret" or the "Presidio Mutiny" cases is wholly without justification.

I am not and do not intend to serve as an apologist for military justice. The system, because it is administered by human beings who possess the same flaws to which we are all subject, has many faults. My primary purpose herein is to focus on those faults which I have come to regard as the most serious, and to recommend and endorse proposals which I believe offer at least a partial solution to those flaws. In the course of this appraisal, which is not intended as an extensive critique, it should become apparent that I believe that military justice offers several examples which could be beneficially emulated by civilian jurisdictions. I know, however, of no system of criminal justice which does not have great room for improvement and the military system is, in this regard, certainly no exception.

MILITARY JUSTICE—AN OUTLINE

The primary source of criminal law within the military is the Uniform Code of Military Justice (UCMJ).³ The UCMJ was enacted by Congress in 1950, revised, codified, and made part of Title 10, United States Code in 1956. Subsequent amendments have resulted in its present form. Article 2 of the Code lists persons who are subject thereto including, for example, certain persons accompanying the armed forces in time of war, cadets, and prisoners of war in the custody of the armed forces.⁴ Naturally, the active duty serviceman is the person most directly concerned with and affected by the Code.

Neatly complementing the UCMJ is the Manual for Courts-Martial,⁵

2. 1969 REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY.

3. UCMJ arts. 1-140, 10 U.S.C. §§ 801-940 (1964), *as amended* 10 U.S.C. §§ 801-936 (Supp. V, 1970).

4. 10 U.S.C. § 802 (1964).

5. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Revised ed.) [hereinafter cited as MCM].

technically a Presidential promulgation which serves, generally, to expand, clarify, and define that which is set forth in the Code. Included in the Manual (MCM), *inter alia*, are discussions of many of the substantive offenses set forth in the Code,⁶ a ready reference to the rules of evidence which are applicable at a court-martial,⁷ and a table setting forth the maximum punishment to which an accused is subject for the offense being tried.⁸

When a serviceman commits an infraction, he becomes subject to various types of punishment, ranging from a tongue-lashing, on the bottom of the scale of severity, to a general court-martial, at the top. More specifically, he may receive in ascending order of seriousness, "nonjudicial punishment,"⁹ a summary court-martial, a special court-martial, or a general court-martial. The essential differences between these procedures lie in the number of persons who become involved therein and the degree of punishment which they are empowered to impose.¹⁰

Nonjudicial Punishment

Nonjudicial punishment, commonly known as "Article 15 punishment," empowers commanders to impose certain limited punishments upon those persons in their command who are suspected of having committed military infractions. The practice contains certain procedural safeguards but, as its name implies, these safeguards are not judicial in nature and are therefore far less formal than those inherent in the court-martial procedure. A serviceman need not accept an offer of nonjudicial punishment and may instead demand his right to be tried by a court-martial, in which case the commander has to decide if the infraction is serious enough to warrant the time, expense, and possible stigma of a court-martial.

This procedure, quite patently, places the accused serviceman on the horns of a dilemma. If he feels he is innocent, he may nonetheless feel compelled to accept the nonjudicial punishment, lest he be convicted by a court-martial and be thus subject to a greater penalty as well as a greater stigma on his record. This situation is a difficult one in which to place a serviceman, usually young and inexperienced at making decisions of such magnitude. In some jurisdictions with which I have

6. *Id.* ¶¶ 156-213.

7. *Id.* ¶¶ 137-154.

8. *Id.* ¶ 127c.

9. UCMJ art. 15, 10 U.S.C. § 815 (1964).

10. UCMJ arts. 15-20, 10 U.S.C. §§ 815-820 (1964).

had contact, a person who was offered nonjudicial punishment was not entitled to consult a military lawyer for assistance in making the decision. While I believe nonjudicial punishment to be a necessary power for the maintenance of discipline, so important within a military organization, I can see no valid reason for not allowing a serviceman the same free access to military counsel in an Article 15 situation as would be his right were he facing court-martial charges. Moreover, I would suggest that such right to counsel be codified, rather than left to the fiat of the local commander or his legal advisor (staff judge advocate).

Summary Court-Martial

A summary court-martial may, subject to service regulations,

adjudge any punishment not forbidden by the code except death, dismissal, dishonorable or bad-conduct discharge, confinement at hard labor for more than one month, hard labor without confinement for more than 45 days, restriction to certain specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay (Art. 20); but in the case of enlisted members above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next inferior grade.¹¹

Compared with other possible disciplinary measures, the summary court does not, therefore, appear to be overly harsh. Such a view, however, overlooks two factors of which the average serviceman is very much aware; the *actual* severity of the impossible sentences as opposed to their apparent leniency (e.g., reduction of a Specialist Fourth Class to a basic Private is a sentence which no enlisted man would regard lightly in view of the consequential effect upon his income), and, more importantly, the absence of most of the procedural safeguards which exist at courts-martial of greater seriousness.

A summary court-martial consists of one commissioned officer who in effect acts as prosecutor, defense counsel, and judge. He examines witnesses, cross-examines, makes findings of fact, renders the verdict, and pronounces sentence. A serviceman is not entitled to be represented by counsel at this level court-martial and it is this aspect of the procedure that invests it with the appearance of evil reminiscent of a "kangaroo court."

I hasten to add that I do not propose abolition of the summary court-

11. MCM ¶ 16b.

martial. Many military defense counsels are frequently quite appreciative of its existence as it enables them to have some leeway in obtaining less severe treatment for their clients. Thus, a commander is not infrequently persuaded by counsel to have an accused person tried by a summary court-martial rather than the special court which had been contemplated. Furthermore, again in deference to various exigencies of the military which must be accepted as inevitable, albeit distasteful, the summary court fulfills a necessary spot within the disciplinary scheme of the military.¹²

Special Court-Martial

A special court-martial is composed of a jury which consists of not less than three members, a military judge serving with such a jury, or, if the accused so requests and the request is granted by the judge concerned, a military judge alone. Empowered to

adjudge any punishment not forbidden by [the UCMJ] except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months,¹³

the special court-martial is, quite obviously, not to be regarded lightly.

Unfortunately, however, until relatively recent developments in military justice, the special court was merely treated as a heavy form of discipline by military authorities. It was bereft of many of the procedural safeguards to which a serviceman facing a punitive discharge and confinement for six months should be entitled. Thus, for example, the commonly voiced complaint that a military defendant was represented by an officer of the command, not legally trained, was a harsh

12. Senator Mark Hatfield, on August 4, 1970, introduced a series of bills in Congress which would greatly change the face of military justice.

S. 4168-4178, 91st Cong., 2d Sess. (1970), 116 CONG. REC. S12666-73 (daily ed. Aug. 4, 1970). One such bill proposes the abolition of the summary court-martial procedure. S. 4177, 91st Cong., 2d Sess. §§ 1, 2 (1970), 116 CONG. REC. S12672 (daily ed. Aug. 4, 1970). These bills, along with an even more sweeping reform proposed by Senator Birch Bayh, are discussed elsewhere herein. Between the two distinguished senators, they successfully focused upon most of the more serious defects of military justice and have made some very sensible proposals that appear to have excellent potential to remedy the defects. With regard to the summary court-martial, Senator Bayh's bill does not go as far, although he recommends a study of the merits of its abolition. Proposed amendment to 28 U.S.C. § 1259 (1964).

13. UCMJ art. 19, 10 U.S.C. § 819 (1964).

fact. Under present practice, few special courts-martial are conducted without legally qualified representation for the defendant, provided at government expense. Similarly, while the special court may still be conducted without the presence of a legally trained military judge, the procedure is clearly a diminishing one, occurring only in those rare instances where it is necessitated by military manpower limitations.

These are steps in the right direction, but I do not believe that they have gone far enough. The right to legally qualified counsel and judges, upon which so much depends, should be codified to ensure that these courts are not subject to the abuses of commanders who are willing, for the sake of "discipline," to make a determination that neither an attorney nor a military judge is "readily available." The proposed legislation of Senator Bayh would implement these procedural changes¹⁴ and I heartily endorse the relevant sections of that legislation.

General Court-Martial

The general court-martial is that with which laymen are most familiar. It is the general court which deals with the more serious offenses under military law, and it is thus the court which receives the lion's share of publicity. Many practitioners prefer practicing before a general court-martial to practicing in civilian criminal courts. This is primarily because of the greater discovery opportunities available to the defendants in the military¹⁵ and the orderly procedure which is typical of the military. Furthermore, appearance at a general court-martial does not require familiarization with entirely new rules of evidence as the rules applicable at the court-martial are quite similar to those utilized in civilian jurisdictions.¹⁶

Nonetheless, critics of military justice, and of the general court-martial in particular, are not entirely off base when they question the equity of the system. There is something which offends the sensitivities of American students of jurisprudence and laymen alike about a system which refuses to the defendant a trial by a "jury of his peers," and which allows a verdict of guilty to be rendered by less than a unani-

14. S. 4191, 91st Cong., 2d Sess. (1970), 116 CONG. REC. S12866-77 (daily ed. Aug. 6, 1970).

15. See UCMJ art. 32, 10 U.S.C. § 832 (1964). See also *United States v. Franchia*, 13 U.S.C.M.A. 315, 320, 32 C.M.R. 315,320 (1962) wherein the Court of Military Appeals recognized that "[m]ilitary law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian criminal prosecution."

16. See generally MCM ¶¶ 136-54.

mous verdict of the finders of fact. It is indeed inconsistent that a military judge, who supposedly has the powers and jurisdiction of his civilian counterpart, is not empowered to determine probable cause for a search, to issue a writ of habeas corpus, or to place a defendant on probation. These flaws are not limited to the general court-martial but it is at this level that they are most manifest. Many of them would seemingly be remedied by the legislation proposed by Senators Bayh and Hatfield, and it is within this context that they are discussed below.

The most often voiced complaint against military justice is the ever-present threat of "command influence."¹⁷ The fear that the commander will unduly influence the results of a given trial is founded in part upon the patently contradictory nature of his multifaceted functions and in part upon empirical evidence that some commanders do indeed try to exert such influence. The Judge Advocate General of the Army has recently stated that he does not believe command influence to be "any more a problem in the military than in the civilian system."¹⁸ Whether or not this is so as a matter of fact is open to serious question, but the fact remains that the military justice procedure creates more opportunity for the exertion of pressure from above than does the normal civilian procedure.

PREFERENCE OF CHARGES AND PRETRIAL CONFINEMENT

Whether or not an accused shall go to trial is, under the present Code, a matter for the determination of the commander of the accused.¹⁹ If a general court-martial is deemed appropriate, a formal pretrial investigation must be conducted and subsequent recommendations made to the commander authorized to convene such a court.²⁰ The recommendation of the investigating officer has become in most cases nothing more than a formal adherence to the statutory requirement. As a practical matter, the convening authority will follow the advice of his legal advisor (the staff judge advocate); or if the case involves an offense about which he feels strongly, he will dispose of it according to his own predilection. No recommendations made to him are binding.

The procedure for bringing a case to a general court-martial (or to any lower court-martial) is faulted primarily for its lack of dependency upon objective legal assessment. Generally, the commander is not

17. See, e.g., *Military Justice on Trial*, NEWSWEEK, Aug. 31, 1970.

18. The Pentagon News, Dec. 3, 1970, at 1, col. 3 (Washington, D.C.).

19. See UCMJ arts. 22-24, 10 U.S.C. §§ 822-824 (1964).

20. *Id.* arts. 32, 34, 10 U.S.C. §§ 832, 834 (1964).

legally trained and is thus not prepared to pay the necessary deference to the legal niceties inherent in the concepts of probable cause and prima facie evidence. Nor is this deficiency remedied by the advice of the staff judge advocate who is a lower ranking officer on the commander's personal staff and thus quite disposed to recommend whatever he believes the commander wishes to hear.

The flaw in the procedure is compounded by the fact that a commander can place the accused in pretrial confinement while charges are pending.²¹ This is true even if he does not personally believe a prima facie case against the accused exists. The potential for use of such confinement as a disciplinary tool is readily apparent and is not overlooked by many commanders. The commander generally knows, or is informed by his staff judge advocate, that he may on his own volition confine an accused person without bail for the indeterminate period required to dispose of the charges. He knows, as well, that under present military law the accused, if convicted, will not necessarily receive credit for the time which he thus serves in pretrial confinement.²²

Senators Bayh and Hatfield appear to be very much aware of these problems and their proposed bills go a long way in propounding remedies which appear quite tenable. The proposed legislation of each establishes an entirely new method of preferring charges and addresses, as well, the inequities concerning pretrial confinement.

Senator Bayh's proposal, which seems to me the better developed of the two, would establish within each of the armed forces an independent "Courts-Martial Command," the sole function of which would be the administration of military justice. Analysis of the relevant section of the bill reflects the following:

Article 6A

The Act would add a new Article 6a to the Code establishing an independent trial command within each of the armed forces. This Courts-Martial Command would be composed of four divisions: Judicial, Prosecution, Defense, and Administration, and would function under the administrative supervision of the Judge Advocate General of the armed force concerned. The Prosecution

21. *Id.* art. 9(b), 10 U.S.C. § 9(b) (1964).

22. 18 U.S.C. § 3568 (Supp. IV, 1970), which assures that federal defendants receive credit for any time served "in connection with the offense or acts for which sentence was imposed" specifically excludes from its aegis defendants sentenced by military courts. The exclusion is unwarranted and seems to raise some fundamental questions about equal protection of the law.

Division would be responsible for determining whether or not there is sufficient evidence to convict any person of the charges brought against him, for bringing the accused before a military judge for preliminary hearing (art. 32) and for referring the case to trial (art. 33). It would also be responsible for detailing trial counsel to courts-martial trials (art. 6a). The Judicial and Defense divisions would be made responsible for the detailing of military judges and defense attorneys to courts-martial trials. Both of these divisions would be independent of all local control and any other control apart from their own division and the service Judge Advocate General. The Administrative Division would convene the court-martial pursuant to art. 1, sec. 15, and art. 25, and would be made responsible for the performance of such general administrative duties as are now performed by the trial counsel and for detailing or employing court reporters and interpreters. The Defense Division would be empowered to utilize such military investigators as shall be required.²³

The essence of the procedure, and its strongest point, is that it removes from the commander the burden of making legal decisions which should properly be in the hands of persons who are trained in the law. The Prosecution Division may be roughly analogized to the office of a United States attorney or a district attorney, whereas the Defense Division finds its nearest civilian counterpart in the legal aid office. The persons responsible for making decisions about the prosecution and defense of a case would not, as they are now, be answerable in any manner to the commander.

Senator Hatfield's proposals would establish "judicial circuits" which would administer military justice within certain geographical areas for all servicemen within that area, regardless of branch.²⁴ The inter-service administration of military justice is an interesting proposal that is worthy of study and development. Considerable duplication of effort and expense might well be saved thereby. However, the concept of the judicial circuit, as contemplated in the bill, seems more of an administrative than a substantive change. The commander, the "convening authority," remains the person who ultimately determines which cases will go to trial, and as long as that situation remains, so do the defects.

Both proposals do, however, undercut the authority of the com-

23. S. 4191, 91st Cong., 2d Sess. (1970), 116 CONG. REC. S12876 (daily ed. Aug. 6, 1970).

24. S. 4168, 91st Cong., 2d Sess. (1970), 116 CONG. REC. S12669 (daily ed. Aug. 4, 1970).

mander insofar as he is empowered to impose pretrial confinement. Senator Bayh's bill would allow an accused to be admitted to bail by a military judge, a right which the serviceman does not presently have. It also provides that the judge may impose such restrictions on the accused in lieu of bail as he determines necessary to reasonably insure the presence of the accused at trial.²⁵ Denial of bail is made appealable as an interlocutory matter to the Court of Military Appeals,²⁶ and pretrial confinement would not be authorized except as therein described.²⁷

Senator Hatfield's proposal would permit the commander to initially order pretrial confinement, allowing the accused to be released upon his own request, or that of his counsel, "unless substantial and convincing evidence is presented to the appropriate Judge Advocate General, or to a military judge . . . that pretrial confinement is necessary to assure the presence of the accused for trial . . .,"²⁸ in which case the pretrial confinement could be ordered continued. Thus, it is still the commander who is called upon to make the initial determination concerning an accused's pretrial incarceration.

While military exigencies might on occasion make it desirable for the commander to have the power to make such a determination, a sufficient number of military judges, readily available, would eliminate the necessity of placing that authority in the commander. The major problem with the Hatfield proposal, as I see it, is that it demands a time-consuming procedure during which the accused would remain in confinement without having had legal review of his case. Absent a requirement that the accused be appointed a defense counsel at the time of his incarceration, there is little cause to believe that he would know enough to seek his own release.

The Bayh proposal, however, is not a panacea for the pretrial confinement problem. It too readily assumes the constant availability of military judges to conduct the preliminary hearing prior to the setting of bail. Some deference must be paid to the fact that the nature of military operations frequently makes impossible the smooth and orderly operation of procedural safeguards. The Bayh bail proposal appears to be a proper and effective method of dealing with the pretrial confine-

25. S. 4191, 91st Cong., 2d Sess. § 2 (prop. art. 32(d)) (1970), 116 CONG. REC. S12870 (daily ed. Aug. 6, 1970).

26. *Id.*

27. S. 4191, 91st Cong., 2d Sess. § 2 (prop. art. 10) (1970), 116 CONG. REC. S12867 (daily ed. Aug. 6, 1970).

28. S. 4172, 91st Cong., 2d Sess. § 1 (prop. art. 10(b)) (1970), 116 CONG. REC. S12671 (daily ed. Aug. 4, 1970).

ment problem, although the commander's prerogatives in a combat situation should be left relatively intact. In this regard, the Hatfield proposal seems to fill the void, allowing for judicial review of the incarceration as soon as is practicable. That review should, however, be made mandatory, and should not be left to depend on the request of the accused or his counsel. Absent mandatory review, an accused should at least be provided with counsel at an early, statutorily prescribed stage of the proceedings, lest he remain confined without the wherewithal to seek his release.²⁹

Senator Bayh's bill contemplates that a defendant who is found guilty and sentenced to a term of confinement will be given credit for any pretrial confinement which he has served as a result of the offenses of which he has been found guilty.³⁰ This provision is in accord with the federal rule mentioned earlier, and should be readily implemented in the interests of justice.

THE MILITARY JURY—SELECTION AND FUNCTION

A general court-martial is composed of a military judge and a military "jury" consisting of not less than five members, or upon an approved and informed request by the accused, it may consist of a military judge alone.³¹ The members of the court are appointed by the commander of the accused and are generally composed of personnel within that command.³² It is this latter fact that has led to the frequent cries that the military court is a "stacked court."

As a practical matter and in all fairness to the much abused military commander, he is seldom the person who actually makes the selection of the general court-martial members. The selection is normally made, in fact, by the submission of a list compiled by the staff judge advocate or the adjutant general's office (the office in charge of personnel management), from which the commander selects the members. The degree of randomness employed in compiling such a list undoubtedly varies from post to post, and similarly, the extent to which the commander picks and chooses names from the list depends on the commander and the interest which he might have in the particular case. Nonetheless,

29. This proposal would gel very nicely with that provision in Senator Bayh's bill which requires that an accused be informed of his right to counsel within 24 hours after arrest or preference of charges, whichever occurs first. S. 4191, 91st Cong., 2d Sess. § 2 (prop. art. 32), 116 CONG. REC. S12870 (daily ed. Aug. 6, 1970).

30. *Id.* (prop. art. 3), 116 CONG. REC. at S12873.

31. UCMJ art. 16, 10 U.S.C. § 816 (Supp. V, 1970).

32. MCM ¶¶ 36 *b*, 36 *c*.

it is apparent that the potential for a truly hand-picked jury is manifestly present; especially in light of the fact that the officers responsible for compiling the list of potential members are on the commander's staff and are generally quite responsive to his whims and desires, be they real or imagined.

Apart from the obvious objection to this system of selecting the court members (*i.e.*, the potential for a stacked court), the method is objectionable in another major aspect. More often than not, the selected members are all officers. Even with the enlisted man's right to be tried upon demand by a court which is comprised of not less than one-third enlisted men,³³ the selection system remains validly subject to the criticism that it pays little deference to the time-honored role of a trial by one's peers.³⁴

The obvious remedy to both of these objections is random selection of court members. Both proposals presently pending before Congress suggest considerable changes in the method of selecting the military jury and both move the selection process far in the direction of randomness.

Senator Hatfield's proposal goes a long way toward remedying the objection that trial by one's peers is ignored within the military. The proposed legislation provides, in pertinent part,

Not less than one-half of the total membership of a general or special court-martial shall be composed of members of the same rank and grade as the accused if the accused . . . [makes a proper and timely request.]³⁵

In analyzing such a proposal one must recognize that military rank is but one of many diverse criteria which must be employed in seeking a true peer group. However, within the military context, where rank-consciousness is pervasive, the importance of recognizing rank as a criterion cannot be overemphasized. The gravamen of the proposal—

33. UCMJ art. 25(c), 10 U.S.C. § 825(c) (Supp. V, 1970). *See also* MCM ¶ 37(c) (2).

34. Conceding that a valid peer group within the military is difficult to define, it is painfully clear that a court comprised of all officers, or of officers and senior non-commissioned officers, cannot be regarded as the peer group for an 18-year-old soldier accused of disrespect to an officer. The situation is roughly analogous to a jury of doctors, bankers and job foremen sitting in judgment of a Black Panther charged with dynamiting a bank.

35. S. 4169, 91st Cong., 2d Sess. § 1 (prop. art. 25(d)) (1970), 116 CONG. REC. S12670 (daily ed. Aug. 4, 1970).

establishing a minimum number of court members of equal rank with the accused—is thus worthy of serious consideration.

Because men of the same rank within the military are as diverse as civilians who hold the same jobs and station in life, merely assuring their representation on the court does not assure that an accused will be tried by a “jury of his peers.” Random selection, though not a guarantee of an unbiased jury, remains recognized in American jurisprudence as the method with the greatest likelihood of approaching that goal.

Senator Hatfield’s proposal in this regard establishes the requirement that court members be randomly selected from a master roll of officers and warrant officers within the command who are, under proposed statutory requirements, eligible to serve on courts-martial. A separate master roll of enlisted men would be maintained from which to make random selection should the accused request enlisted men on the court.

I believe this aspect of the proposal to be too myopic. It leaves to the commander (convening authority) the responsibility of selecting the persons who shall serve on a court-martial and thus, despite the requirement of random selection from a list, it invites the continued abuse of the hand-picked jury. It is not difficult to imagine subordinate officers closing their eyes to the actions of a superior who makes specific rather than random selections from the master roll of eligible court members. Though this would, concededly, probably not occur in the majority of cases, it is only unfamiliarity with the military superior-subordinate relationship that could lead one to believe that it would never occur. Furthermore, I believe that serious questions are raised as to whether a selection of court members limited to those within the command would effectively comport with the principles of randomness. Certainly some commands are large enough to permit a true random selection therefrom (*e.g.*, an Army Division is, at full strength, 15,000), but others are not. This could be readily worked out, however, by appropriate departmental regulations.

Senator Bayh’s proposal reflects a recognition of the two flaws discussed above. His proposed Article 25 provides:

(b) Members of a general or special court-martial shall be selected on a random basis from among all those eligible persons permanently stationed within the geographical limits of the Regional Command convening the court-martial unless the Secretary concerned prescribes by regulation the selection of court members from geographical areas smaller than the limits of the Regional Command. Any such regulation shall be consistent with the prin-

ciple of randomness. The selection of court members shall to the maximum extent practicable, follow the procedure prescribed for the selection of Federal juries.

(c) No member of an armed force is eligible to serve as a member of any court-martial when he is the accuser, a witness, or has acted as an investigating officer or as counsel in the same or a related case.³⁶

The most notable aspect of the method of selecting court members under Senator Bayh's proposal is that the function is carried out not by the commander, but by the independent Administrative Division of the Courts-Martial Command. Also significant is the elimination of any necessity for an accused to request the presence of enlisted men on his court-martial, an existing requirement which presupposes some superior ability of officers to render justice to enlisted men and reflects a somewhat atavistic view toward military justice.

The broader geographical area from which court members would be selected in the Bayh bill, subject to departmental regulations which could make provision for smaller commands (*e.g.*, on board a ship), remedies the objection which I have voiced concerning the limitation of selecting members from within a limited command. However, it leaves unmentioned the question of whether an officer should be judged by enlisted court members who are randomly selected or whether a senior noncommissioned officer should be tried by those junior to him.³⁷ In this regard, Senator Hatfield has included in his proposals the provision that "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade."³⁸

This provision is identical to existing law,³⁹ and I believe that it should remain. While it can be argued quite strongly that only a cross-section of the entire military community should appropriately pass judgment

36. S. 4191, 91st Cong., 2d Sess. § 2 (prop. arts. 25(b), (c)) (1970), 116 CONG. REC. S12869 (daily ed. Aug. 6, 1970).

37. Under present law, all parties possess an unlimited number of challenges for cause. UCMJ art. 41(a), 10 U.S.C. § 841(a) (1964). Neither proposal alters this right, and necessarily so. Thus, the higher ranking defendant who fears bias on behalf of a junior court member may conduct a *voir dire* in order to assert his challenge. That he is not entirely unprotected, however, fails to provide an answer to the military objection of a subordinate judging his superior.

38. S. 4169, 91st Cong., 2d Sess. § 2 (prop. art. 25(e)(5)) (1970), 116 CONG. REC. S 12671 (daily ed. Aug. 4, 1970).

39. UCMJ art. 25(d) (1), 10 U.S.C. § 825(d) (1) (1964). *See also* MCM ¶ 4c.

upon an accused member of that community, I do not believe that military discipline can effectively be maintained if superiors are made directly answerable to their subordinates.

The military jury has as its function the finding of guilt or innocence and, should a verdict of guilty be rendered, the assessment of a sentence. Apart from the ill-founded objection that its composition is of military men with "military minds,"⁴⁰ the most frequently voiced complaint concerning its workings is that a guilty verdict can be rendered by a less than unanimous verdict.

Unanimity is required to return a guilty finding in a general court-martial only in those rare cases in which the death penalty is made mandatory by law.⁴¹ In all other cases, unless an accused pleads guilty, a guilty finding may be returned upon the concurrence of only two-thirds of the members present at the time the vote is taken.⁴² This stands in bleak contrast to the requirement of unanimity with which civilians, laymen and attorneys alike, are so familiar.

The contrast may not be as bleak as it would appear at first blush. In a civilian court, if unanimity is not reached, the result is a "hung jury" and the defendant may subsequently be subjected to the agony of another trial. No such result can obtain in the military where, if the two-thirds requirement cannot be met, an acquittal results.⁴³ Thus, there can be no hung jury in the military, a fact which undoubtedly increases the efficiency of military justice.

Efficiency, however, is not a substitute for justice. The court-martial, like any civilian criminal court, is instructed that an accused is presumed innocent until proven guilty beyond a reasonable doubt.⁴⁴ It seems to me, however, that if one-third of the presumed reasonable men on the court vote for acquittal, there exists a reasonable doubt as to the guilt of the accused and that the two-thirds rule presently employed is thus in fact an abrogation of the reasonable doubt requirement. That requirement is too firmly embedded in American jurisprudence to allow it to be so easily dismissed. I would propose that the requirement

40. I categorize this objection as "ill-founded" in a limited sense. Doubtless there are cases in which a military background will imbue the court member with certain predispositions. Especially is this so in cases involving offenses of a military nature; *e.g.*, disrespect to or disobedience of an officer. Such predispositions, however, are not alien to civilian juries. Military courts with which I have had experience have *generally* been comprised of fair-minded individuals trying their best to objectively sift evidence.

41. UCMJ art. 52(a)(1), 10 U.S.C. § 852(a)(1) (1964).

42. *Id.* art. 52(a)(2), 10 U.S.C. § 852(a)(2) (Supp. V, 1970).

43. MCM ¶ 74d(3).

44. *Id.* ¶ 74a.

of unanimity be adopted for the military lest the standard of reasonable doubt merely continue to be a goal to which lip service is deferentially paid.

THE MILITARY JUDGE

One of the most significant advances in military justice within the past two decades was the creation of the independent military judge⁴⁵ by the Military Justice Act of 1968.⁴⁶ One main purpose of the Act was "to redesignate the law officer of a court-martial as a 'military judge' and give him functions and powers more closely allied to those of Federal district judges."⁴⁷ Unfortunately, the intent of Congress was not well articulated in the enacted legislation, and the military judge has been left to flounder in ignorance regarding the precise extent of his powers.

The proposed role of the military judge vis-à-vis the pretrial confinement of military defendants has been discussed above. I endorse those aspects of the pending legislation which would grant to the military judge other pretrial functions consistent with his civilian counterpart.

The issue of the serviceman's right to privacy is as much a subject of litigation as is that of the civilian defendant. It is well-established that the law of search and seizure, rendering inadmissible evidence seized as a result of a search conducted without probable cause, is applicable to evidence offered into a court-martial.⁴⁸ Whereas the determination of probable cause in a civilian jurisdiction is made by magistrates or judges, in the military it is the commander who is called upon to determine the existence of probable cause prior to authorizing a search.⁴⁹ Moreover, despite urging by the Court of Military Appeals,⁵⁰ there exists no requirement that the commander put his authorization in writing, a situation that lends itself to "convenient" memories at subsequent hearings held to review the probable cause determination.

45. UCMJ art. 26, 10 U.S.C. § 826 (Supp. V, 1970).

46. 82 Stat. 1335-43, 10 U.S.C. § 801 *et seq.* (Supp. V, 1970).

47. S. REP. No. 1601, 90th Cong., 2d Sess. 3 (1968). *See also* H.R. REP. No. 1481, 90th Cong., 2d Sess. 2 (1968).

48. MCM ¶ 152; *United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963); *United States v. Ness*, 13 U.S.C.M.A. 8, 32 C.M.R. 18 (1962). *See generally* Webb, *Military Search and Seizures—The Development of a Constitutional Right*, 26 MIL. L. REV. 1 (1964).

49. *See, e.g.*, *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); *United States v. Bartista*, 14 U.S.C.M.A. 70, 33 C.M.R. 282 (1963).

50. *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

In most military prosecutions the accuser of record is the immediate commander of the accused and, where a search has been made, he is generally the same person who has authorized the search. Thus, the service frequently places the commander in the contradictory position of being policeman, accuser, and key prosecution witness on the one hand, and objective assessor of probable cause on the other.

The procedure of "antecedent justification before a magistrate" has been categorized as "central to the Fourth Amendment."⁵¹ This requirement is obviously intended as a very real safeguard and not a mere formality.⁵² To contend that a commander intent upon uncovering marijuana within his command possesses the objectivity contemplated by the Fourth Amendment would be to ignore that aspect of human nature which results in the loss of objectivity by one who is zealously pursuing a goal. Indeed, the Supreme Court has continually recognized this aspect of human nature as a basis for the warrant requirement, if it is not truly the Amendment's *raison d'être*:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a *neutral and detached magistrate* instead of being judged by the officer engaged in the . . . enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity. . . .⁵³

The Court of Military Appeals has also recognized the importance of placing the probable cause determination in the hands of one who is not actively participating in the pursuit of a criminal offender:

The fundamental idea behind the requirement that there be authorization to search separate from that of a police officer is that the official to whom the request is made brings "judicial" rather than a "police" attitude to the examination of the operative facts.⁵⁴

51. *Ohio ex rel. Eaton v. Price*, 364 U. S. 263, 272 (1960). See also *Osborn v. United States*, 385 U.S. 323, 330 (1966).

52. See *McDonald v. United States*, 335 U.S. 451, 455 (1948).

53. *Johnson v. United States*, 333 U. S. 10, 13-14 (1948) (emphasis added). See also *Spinelli v. United States*, 393 U.S. 410, 415 (1969); *Schmerber v. California*, 384 U.S. 757, 770 (1966).

54. *United States v. Ness*, 13 U.S.C.M.A. 18, 20 n.1, 32 C.M.R. 18, 20 n.1 (1962).

Yet, curiously, no requirement has been imposed that someone other than the commander make the requisite determination of probable cause. Furthermore, when he does make that determination, he is not required to issue a warrant or to in any other manner place his determination or the reasons therefor in writing.

Despite many misconceptions to the contrary, the time is long past when it can be validly stated that the donning of a military uniform serves to strip the individual of the fundamental constitutional rights with which he is otherwise clothed.⁵⁵ Prior to the creation of the position of military judge, the reluctance of the military to remove from the commander the responsibility of making the probable cause determination was perhaps understandable. It is not so any longer.

The proposed legislation of Senator Bayh would seem to remedy this defect. His Article 46(b), as proposed, would make the probable cause determination a function of a military judge within the Regional Command and would require, prior to an arrest or a search, a warrant supported by written affidavits "particularly describing the person or thing to be seized." To comport with existing federal law, the legislation permits a warrantless search or seizure when necessary to protect the life of a person making an arrest or to prevent the destruction of evidence.⁵⁶

Certain valid objections may be made to the proposal from a military point of view. For example, are the hands of a commander tied when he is in a combat zone without a military judge, and has probable cause to believe that an offense has been committed? This problem, unique to the military, cannot be ignored by any new legislation. Perhaps the answers to such problems can be effectively supplied by departmental regulations. This appears to be suggested by the Bayh proposal, granting the warrant authority to military judges "in accordance with regulations promulgated by the President."⁵⁷ Departmental regulations, however, have generally tended to be self-serving and I would hope that proper Congressional committees would set forth guidelines in this area, sufficiently specific to prevent circumvention of the salutary procedure sought by the discussed proposal.

Under present military procedure, a defense counsel must first apply

55. See, e.g., *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

56. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *McDonald v. United States*, 335 U.S. 451, 454-56 (1948); See also MCM ¶ 152.

57. S. 4191, 91st Cong., 2d Sess. § 2 (prop. art. 46(b)(1)) (1970), 116 CONG. REC. S12872 (daily ed. Aug. 6, 1970).

to the prosecuting attorney (trial counsel) in order to compel the attendance of a witness which he believes necessary for the defense of the case. This frequently forces the defense counsel to reveal to the prosecution much about the defense trial strategy without a commensurate obligation on the prosecution to reciprocate. If the trial counsel does not believe that the testimony of the requested defense witness is "material and necessary," the request may be forwarded to the convening authority for his determination. A denied request may be renewed before the military judge at trial.⁵⁸

Apart from the obvious disadvantage inherent in revealing to the trial counsel a good deal of the defense strategy, the present procedure is frequently time-consuming and ineffective. Even if the military judge at trial determines that the defense witness should be subpoenaed, it is often too late to effectively do so. A defense attorney cannot plan a trial strategy around witnesses whom he may not be able to produce at trial. Similarly, he may not want to recess the trial for the frequently lengthy duration between the military judge's determination and the time at which the witness can actually be procured. Especially is this so if the accused will be required to remain in pretrial confinement during this period.

The solution to the problem, I believe, once again lies with the military judge. Both legislative proposals have recognized the problem and both offer, with minor variations, the solution of placing the subpoena power in the military judge.⁵⁹ This is the logical remedy and I endorse it. It would serve to make the military judge, as Congress has intended, more akin to his civilian counterpart. It would save time and expense and would do away with the present inequity of a procedure which makes the subpoena of a defense witness considerably more difficult to obtain than that of a prosecution witness. The present situation was obviously not intended by Congress when it passed the presently existing Article 46:

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.⁶⁰

58. MCM ¶ 115.

59. S. 4191, 91st Cong., 2d Sess. § 2 (prop. art. 46(a)) (1970), 116 CONG. REC. S12872 (daily ed. Aug. 6, 1970); S. 4175, 91st Cong., 2d Sess. § 1 (prop. art. 46) (1970), 116 CONG. REC. S12672 (daily ed. Aug. 4, 1970).

60. UCMJ art. 46, 10 U.S.C. § 846 (1964).

A federal judge may, in imposing a sentence, suspend any part thereof as he deems appropriate and place the defendant in a probationary status.⁶¹ The military judge is not specifically granted that power, though it has on occasion been asserted (but not confirmed by appellate courts).⁶² The military judge is limited to recommending suspension to the convening authority in whom resides plenary power to lessen the severity of a sentence adjudged by a court-martial.⁶³

The military judge is thus placed in the somewhat awkward position of being forced to impose a sentence which he believes should be suspended, or alternatively, fearing that his recommendation for suspension will be rejected, not imposing a sentence which he feels would be appropriate. This situation does little to enhance the stature of the military judge and it goes a long way toward reinforcing the idea that military justice is but an extension of the arm of discipline rather than a true system of criminal jurisprudence.

Senator Bayh's bill would grant to the military judge the power to suspend or remit any court-martial sentence.⁶⁴ The proposal, consistent with the goal of constituting the military judge a judge in the true sense of the word, is commendable. Presumably, the power to "remit" sentences is intended to grant the military judge the same clemency power which now resides in the convening authority,⁶⁵ and this provision is certainly not objectionable.

The Bayh proposal, however, in granting these sentencing powers to the military judge also establishes him as the sole sentencing authority, thus removing from the members of a court-martial (where trial by judge alone has not been requested) their present sentencing function. This proposal properly disturbs many military defense counsels who would much rather make their sentencing appeals to court members who have not been hardened to pleas in extenuation and mitigation by virtue of the fact that they have heard the same plea many times before.

Legal authorities have traditionally been in wide disagreement concerning whether the judge or the jury is the proper sentencing authority. The considerations which govern this debate are basically the same within the military as without. We should not follow, however, that which experience has shown us to be undesirable or unjust. The

61. 18 U.S.C. § 3651 (1964).

62. *See, e.g.,* United States v. Pierce, SPCM 6145 (ACMR 1971).

63. UCMJ art. 64, 10 U.S.C. § 864 (1964); MCM ¶ 88e.

64. S. 4191, 91st Cong., 2d Sess. § 2 (prop. art. 26(a)) (1970), 116 CONG. REC. S12869 (daily ed. Aug. 6, 1970).

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

traditional military role of the court members (the jury assessing punishment) should continue.⁶⁶

My own hesitancy in granting the sole sentencing power to the military judge is founded upon the fact that most senior military judges are presently officers who have been staff judge advocates and who thus seem to be imbued with a prosecution orientation. If, however, we are to establish a new and fresh system of military justice, as is promised by the pending legislation, then it must be presumed that new methods of selecting military judges will be implemented. Indeed, present training programs within the military seem headed in this direction, emphasizing the role of the military judge *qua* judge and deemphasizing his role as a military officer.

The "All Writs Act" provides, *inter alia*, that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions. . . ." ⁶⁷ It is now well established that the Court of Military Appeals is deemed to possess the all-writs power under this provision of the law⁶⁸ though Senator Hatfield's proposal to specifically codify that power in a somewhat broader form should in the interest of clarity be adopted.⁶⁹ It is uncertain as to whether the Courts of Military Review, which are the intermediate appellate courts, possess the same power,⁷⁰ but there seems little reason for it to be withheld from those tribunals.

The existence of all-writs power in judicial bodies located in or near Washington, D.C., however, is of little avail to the defendant or his counsel in Vietnam who seeks a writ of habeas corpus in order to obtain immediate release from an allegedly illegal confinement. Should the military judge stationed within such an area stand idly by, unable to review such allegations and remedy their effects? I think not and thus strongly recommend the adoption of Senator Bayh's proposal to specifically grant all-writs power to the military judge.⁷¹ Once again, this would serve to place him in a position similar to that of his civilian counterpart. More importantly, however, it would further diffuse the

66. This suggestion has been made by one of the primary military law advisors of Senator Bayh, an Army captain stationed in Washington, D.C.

67. 28 U.S.C. § 1651(a) (1964).

68. *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

69. S. 4174, 91st Cong., 2d Sess. § 2 (prop. art. 67(h)) (1970), 116 CONG. REC. S12671 (daily ed. Aug. 4, 1970).

70. *Compare* *United States v. Draughon*, No. 419184 (ACMR, March 20, 1970) *with* *Gagnon v. United States*, Misc. Docket No. 70-2 (A.F.C.M.R., April 14, 1970).

71. S. 4191, 91st Cong., 2d Sess. § 2 (prop. art. 26(b)) (1970), 116 CONG. REC. S12869 (daily ed. Aug. 6, 1970).

commander's present pervasive authority over the administration of military justice and properly place that authority in the hands of legally trained and, hopefully, judicially-oriented personnel.

MILITARY JURISDICTION

In 1969, the Supreme Court rendered a decision which promised to have far-reaching effects upon the administration of military justice. In the landmark decision of *O'Callahan v. Parker*,⁷² the Court ruled that courts-martial were without jurisdiction to try military personnel for offenses that lacked a sufficient "service connection." Subsequent decisions of the military appellate courts have effectively limited the effect of *O'Callahan* so that the scope of offenses triable by court-martial has not been diminished to nearly the extent that many had anticipated when the decision was rendered.⁷³ Thus, for example, the Court of Military Appeals has held that any offense committed on a military installation has a sufficient nexus with the military to justify court-martial jurisdiction.⁷⁴ They have held that there is jurisdiction over all offenses committed by American servicemen in foreign countries,⁷⁵ and over all offenses which are committed by one serviceman against another, even if the offender is ignorant of the status of the victim.⁷⁶ A considerable number of cases have been dismissed on appeal based on *O'Callahan*,⁷⁷ but despite the jurisdictional nature of the holding, it has been held to have only a very limited retroactivity. It applies only to those cases which were "not final" on the date of its decision.⁷⁸ Even the definition of "finality" seems to have been stretched in an effort to restrict the applicability of *O'Callahan*.⁷⁹

The attempts by the military courts to so limit the effect of *O'Callahan* are understandable and were readily predictable. In part, the blame must be laid at the feet of Mr. Justice Douglas, who wrote the majority

72. 395 U.S. 258 (1969).

73. See, e.g., Comment, *O'Callahan v. Parker and Its Progeny: Survey of Their Impact on the Jurisdiction of Courts-Martial*, 15 VILL. L. REV. 712 (1970).

74. *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *United States v. Smith*, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969).

75. *United States v. Blackwell*, 19 U.S.C.M.A. 196, 41 C.M.R. 196 (1970); *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969).

76. *United States v. Plamondon*, No. 21,656 (U.S.C.M.A., Oct. 10, 1969).

77. E.g., *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Borys*, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969).

78. *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).

79. *United States v. Enzor*, COMA Misc. Docket No. 70-60 (U.S.C.M.A., Jan. 15, 1971).

opinion for the Supreme Court in a manner more consistent with the criticism of military justice than with the establishment of meaningful guidelines with which to apply the Court's decision and from which to glean its intent. The military courts were thus left to fend for themselves, assessing jurisdiction on an ad hoc basis. Once placed in that position, the self-serving nature of their decisions was virtually inevitable.⁸⁰

O'Callahan seems fundamentally founded upon the premise that the function of the military is to fight and deter wars and that military justice is justifiable only insofar as it is related to that function. Perhaps because of the judicial erosion of *O'Callahan*, Senator Hatfield has proposed the statutory elimination of military jurisdiction over all offenses other than those that are strictly military in nature.⁸¹ Thus, for example, the military would retain jurisdiction over offenses such as disobedience of orders, disrespect to superiors, and absence without leave and desertion, while they would lose jurisdiction over offenses of a more general nature such as larceny, rape, assault (except upon superiors) and murder. The proposal is attractive, seemingly consistent with the Supreme Court's original intent in *O'Callahan*, and it is certainly worthy of serious consideration.

Initially, however, I am hesitant to assert that military discipline is not significantly affected when a serviceman commits an offense of any nature.⁸² It is only a partial answer to assert that he will be punished by the civilian authorities. There is, at least presently, a tendency on the part of local authorities not to prosecute civilian-type offenses unless they have egregiously offended local sensibilities. Whether absence of military jurisdiction over such offenses would increase their propensity to prosecute is a matter for speculation, but I have little confidence that that would be the case.

I am convinced that the military defendant can receive a trial that is at least as fair as that received by a criminal defendant in a typical federal prosecution. It will frequently be far more equitable than many state prosecutions. I have little doubt, for example, that the black soldier

80. See, e.g., the dissenting opinion of Chief Judge Quinn in *United States v. Borys*, 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969).

81. S. 4178, 91st Cong., 2d Sess. § 5(B) (prop. art. 21(a)) (1970), 116 CONG. REC. S12672 (daily ed. Aug. 4, 1970).

82. I have, for the purposes of this article, accepted the premise that an effective military force is a present necessity and that a military force cannot be effective absent a certain degree of discipline. Failure to accept that premise renders any discussion of military justice futile.

accused of robbery or rape before a military court is likely to encounter far less bias than if he was similarly accused before a court in the Deep South.

I do not address myself to the constitutionality of military jurisdiction over non-service-connected offenses. The matter is again pending before the Supreme Court in a case involving the retroactive application of *O'Callahan*.⁸³ I would not be surprised if that case resulted in a retreat from the position set forth in *O'Callahan* as the Court's composition has been so altered since that decision. I am not yet convinced, however, that Article I of the Constitution, establishing within Congress the power to "make Rules for the Government and Regulation of the land and naval forces,"⁸⁴ does not permit the establishment of a system of criminal justice for members of those forces.

ARTICLE 134—THE GENERAL ARTICLE

I have not yet discussed the substantive offenses which are covered by the Uniform Code of Military Justice.⁸⁵ Essentially, they are straightforward criminal offenses which one can find in any civilian penal code, in addition to offenses of a uniquely military nature, such as disrespect to and disobedience of superiors. They are, for the most part, notably unobjectionable insofar as they set forth elements of the offenses and the punishments therefor.⁸⁶ The significant exception to this general acceptability is Article 134.⁸⁷

Article 134 provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

83. [As this article went to press, the Supreme Court handed down this pending decision, which did in fact limit the effect of *O'Callahan v. Parker*. *Relford v. Commandant*, 39 U.S.L.W. 4240 (U.S. Feb. 24, 1971).]

84. U.S. CONST. art. I, § 8.

85. UCMJ arts. 77-134, 10 U.S.C. §§ 877-934 (1964).

86. Punishments are set forth more specifically by Presidential directive. MCM ¶ 127c.

87. 10 U.S.C. § 934 (1964).

The objectionable vagueness of this provision virtually leaps out at any lawyer who reads it. Yet, repeated attacks upon the validity of the article have met with failure.⁸⁸

The serviceman is thus required to act at his peril to a far greater extent than his civilian counterpart. Even if an act has already been determined to be punishable under Article 134, it is unlikely that it has been specifically codified. Furthermore, he has no guarantee that any act he commits will not be deemed by his commanding officer to have "prejudiced good order and discipline within the command or to have brought discredit upon the armed forces." The Article thus seems to be an invitation to the creation of what could be easily regarded as a bill of attainder or an *ex post facto* law, and as such, is anathema to American jurisprudence.

Under the aegis of Article 134, servicemen are presently prosecuted for offenses such as dishonorable failure to pay debts; the uttering of disloyal statements, tending to undermine discipline and loyalty; unauthorized use of a military pass; committing a nuisance; pandering; allowing a prisoner to do an unauthorized act; straggling, appearing in unclean or unauthorized uniform; and wrongful cohabitation.⁸⁹ More common offenses which are generally prosecuted under the article include wrongful possession, sale, transfer or use of habit-forming drugs and marijuana; drunk and disorderly conduct; indecent acts with another; perjury or its subornation; solicitation of an offense; and communicating a threat.⁹⁰

The offenses which have been so included within Article 134 are generally offenses which seem a proper matter for judicial action against the perpetrator. There seems little reason, however, for such offenses not to be codified so as to create sufficient notice for the potential offender. Abolition of general punitive articles, such as Article 134, would go a long way toward making the serviceman more secure against unwarranted prosecution for any action which happens to offend his military superior.

It can be argued with some validity that no statute can anticipate the broad range of activities which might be carried on by servicemen and which cannot be tolerated within a military structure. While this argument may be true, in balancing the requirement for military discipline

88. See, e.g., *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964); *United States v. Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953).

89. The maximum punishments for these offenses are set forth in MCM ¶ 127*c*.

90. *Id.*

against the deference which must be paid to the rule of law, I strongly believe the latter must prevail.

Senator Hatfield has proposed what appears to be a logical compromise between these two countervailing considerations. He would amend Article 134 to make infractions which are in fact "prejudicial to good order and discipline" or "of a nature to bring discredit upon the armed forces" subject only to nonjudicial punishment.⁹¹ This proposal will undoubtedly be unacceptable to the legal purists who will correctly argue that it does not cure the vagueness objection. It does, however, arrive at a pragmatic solution to a very real problem. The proposal would allow the commander to administer discipline for actions which in fact cannot be tolerated within a military setting. It would, nonetheless, insulate the serviceman from incarceration or discharge from the service because he has committed such an act unless the act had been statutorily prohibited.⁹²

CONCLUSION

We live in a time in which, like perhaps no other time in America's history, traditional concepts of law and morality are undergoing close scrutiny and resultant change. Nowhere is this more evident than in the armed forces. Young soldiers are not as willing as they once seemed to blindly obey the orders of their superiors. This is undoubtedly due in part to the great ferment created by the war in Vietnam. It is due also, I suspect, to the belief of many servicemen that they have entered a system in which they are treated inequitably; less like human beings than machines.

We have learned, by sad experience, that inequitable laws spawn disrespect for the law, and that disrespect in turn eventually leads to disobedience, not only of those laws regarded as inequitable, but of any law which is deemed by the individual to be too oppressive or demanding. Society cannot tolerate such an attitude and remain cohesive. Much less can this attitude be endured by a military body, where obedience to orders is the very essence of its function. The answer, I believe, is not harsh retribution for disobedience, but rather the establishment of a body of law that deserves the respect of the governed.

91. See text accompanying note 12 *supra*.

92. Prior to adopting such a proposal, however, study must be made concerning the ability of the serviceman to refuse the nonjudicial punishment and demand trial by court-martial. If trial by court-martial is not permitted for the charged offense, his refusal could insulate him from any punishment. If court-martial *is* permitted, the vagueness question must be again confronted.

As long as there exists the necessity of an effective armed force, a prospect that unfortunately seems destined to be with us for a long time, there will be the necessity for a method of enforcing discipline within that force and of meting out justice to those who choose to disobey the rules. The two proposals presently pending in Congress seem to go far toward the establishment of rules which are compatible with the interests of the military and the individual alike. Much committee work will undoubtedly be required in order to iron out the many practical problems inherent in any working system of justice. The ultimate result, however, promises to be well worth the effort.