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THE JUSTICE OF MILITARY JUSTICE

LOUIS B. NICHOLS*

During the past year, there are those who have declared open season upon our military services. Headlines have appeared, often without justification, demeaning our military men. The system of military justice has frequently been singled out as a target, using an individual situation as a vehicle to condemn a system, oftentimes under the banner of seeking justice and preventing an infringement of individual rights. To err is human and the military services, made up of humans, are bound to make mistakes. But personal failures alone are not justification to condemn a system.

It is unfortunately true that in our times successes seldom make headlines. Only failures attract widespread public attention. It is the author's firm conviction, arrived at after viewing our system of military justice over a long span of time, that more progress has been made in making justice a reality in the military than in practically any state in the Union. To be sure, the administration of justice in the military has been the subject of considerable discussion in the public forum.¹ This article, therefore, has a threefold purpose: to discuss the need for a separate system of criminal justice in the armed forces; to compare the present system of military justice with comparable civilian systems and with idealized standards; and to comment on proposals for improvements and modifications in the system.

Historically, armies have been governed by military criminal codes which did not apply to society at large, and they have used their own tribunals for the trial of offenses.² The Constitution of the United States provides that Congress shall have power "To make Rules for the Government and Regulation of the land and naval forces" ³ This constitutional provision has been interpreted as authorizing the enactment of

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1. S. 4191, 91st Cong., 1st Sess. (1970); S. 4168—S. 4178, 91st Cong., 1st Sess. (1970); S. 3117, 91st Cong., 1st Sess. (1969); 116 CONG. REC. 13,400 (daily ed. Aug. 13, 1970); 116 CONG. REC. 12,862 (daily ed. Aug. 6, 1970); 116 CONG. REC. 12,666 (daily ed. Aug. 4, 1970); R. SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970); Bishop, *The Quality of Military Justice*, N.Y. Times, Feb. 22, 1970, (Magazine), at 32. See Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970); Rothblatt, *Military Justice or Injustice: The Green Beret Case*, 75 CASE AND COMMENT 3 (July-August 1970).

2. See W. WINTHROP, *MILITARY LAW AND PRECEDENTS*, 17 *et seq.* (2d ed. 1920).

3. U.S. CONST. art. I, § 8.

a criminal code which applies only to the military and the creation of a separate system of tribunals for the trial of these offenses.⁴ "Cases arising in the land and naval forces" are expressly excepted from the Fifth Amendment's provision requiring a grand jury presentment or indictment for capital or infamous crimes, and, by implication, they are excepted from the Sixth Amendment requirements for trial by jury.⁵ The Supreme Court has denied courts-martial jurisdiction only as to persons and offenses without a sufficient military connection.⁶

Courts-martial were long viewed as "instrumentalities of the executive power."⁷ Military justice and courts-martial were considered to be adjuncts to the commander's power and responsibility to maintain good order and discipline—military law and order—and he possessed great power over the military justice process.⁸

In 1950, Congress enacted the Uniform Code of Military Justice.⁹ Significant amendments to the Code were contained in the Military Justice Act of 1968.¹⁰ Although military commanders still possess disciplinary powers,¹¹ the system of military justice under the Uniform Code of Military Justice has evolved to the point where it is a mature and sophisticated system of justice.

NEED

The historical and constitutional bases for a military criminal code and military justice system are buttressed by practical necessity. Crim-

4. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858).

5. See *O'Callahan v. Parker*, 395 U.S. 258, 262 (1969); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123, 138-39 (1866).

6. See *O'Callahan v. Parker*, 395 U.S. 258 (1969); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles*, 350 U.S. 11 (1955).

7. *W. WINTHROP*, *supra* note 2, at 49.

8. For the basic proposition that a commander is responsible for the conduct of his troops, see *In re Yamashita*, 327 U.S. 1, 14-16 (1946); see also art. 1, Annex to Fourth Hague Convention of 1907, relating to the laws and customs of war on land that to be recognized as a lawful belligerent, an armed force must be "commanded by a person responsible for his subordinates." As late as World War II, the commanding officer who convened a court-martial could advise the court-members of his displeasure and non-concurrence in an acquittal or in a finding of not guilty and could reflect this displeasure and nonconcurrence in the efficiency reports of the court-members. A *MANUAL FOR COURTS-MARTIAL*, U.S. ARMY 1928. This is no longer permitted. *UNIFORM CODE OF MILITARY JUSTICE*, art. 37, 10 U.S.C. § 837 (1964) [hereinafter cited as UCMJ]; *MANUAL FOR COURTS-MARTIAL*, UNITED STATES, 1969, ¶ 38 (Revised ed.) [hereinafter cited as MCM], enjoin acts to influence military courts, including their participants.

9. 10 U.S.C. §§ 801-940 (1964), as amended (Supp. V, 1970).

10. 82 Stat. 1335 (1968).

11. See text accompanying notes 20-23 *infra*.

inal law in civilian society generally has a preventive as well as a rehabilitative function. It restricts antisocial behavior to enable people to live together in accepted social patterns. The successful accomplishment of a military mission requires more than prevention of antisocial behavior; it requires absolute loyalty and a commitment found in few other places in society. This loyalty and commitment are so important to the society as a whole that the criminal law is used to make certain it exists. Military law has a motivating as well as preventive function. It not only must deter improper conduct, but also must promote an attitude of respect for authority and adherence to discipline. Discipline instills in a soldier a willingness to obey an order no matter how unpleasant or dangerous the task to be performed. Discipline conditions the soldier to perform his duty even if it requires him to act in a way that is highly inconsistent with his basic instinct for self-preservation.

The need for discipline in the military justifies having military offenses which have no counterpart in civilian life. In civilian life, if an employee disobeys the instructions of his employer or is absent from work, the potential consequences may be serious but not so serious as to justify the imposition of criminal sanctions. The worker may be fired or some other sanction may be applied. The potential consequences of disobedience of an order or absence from duty in the military are so great that criminal sanctions are often justified. And this is true even in the peacetime or garrison situation because the soldier or sailor never knows when his unit will be mobilized. If the soldier or sailor believes that he can disobey an order or be absent from duty without an excuse in peacetime, he may well believe he can do this in war. Thus, the rationale for offenses such as desertion,¹² absence without leave,¹³ missing movement,¹⁴ and failure to obey a lawful order¹⁵ becomes apparent.

Inherent in the concept of discipline, and necessary for the accomplishment of the military mission, is a superior-subordinate relationship. The exigencies of combat do not permit a plan of action to be debated where decisions frequently must be made on a split second basis. A military commander must have absolute confidence that his orders will be obeyed. Disobedience of an order may result not only in danger to the individual who disobeys, but also to the mission, the military unit,

12. UCMJ art. 85, 10 U.S.C. § 885 (1964).

13. *Id.* art. 86, 10 U.S.C. § 886 (1964).

14. *Id.* art. 87, 10 U.S.C. § 887 (1964).

15. *Id.* art. 92, 10 U.S.C. § 892 (1964).

and ultimately to the nation, to say nothing of his comrades whose very lives might depend on the proper execution of an order. The superior should have the respect and loyalty of his subordinates to ensure the accomplishment of the military mission. Any conduct which detracts from the respect toward, and confidence in the superior weakens his authority, and certain military offenses are designed to assure obedience by promoting respect. Thus, disrespect toward a superior commissioned officer,¹⁶ assaulting a superior commissioned officer,¹⁷ and insubordinate conduct toward warrant officers, noncommissioned or petty officers,¹⁸ are punished as criminal even though similar conduct in civilian life might not be punishable at all. Necessity, therefore, dictates that the military criminal code contain uniquely military offenses and that the military possess its own judicial system capable of trying the accused for alleged military offenses, and, in many situations, for civilian type offenses.

All enlightened systems of criminal justice are concerned with the rehabilitation of convicted offenders. Rehabilitation is extremely important for the military because manpower is its most precious asset. The goal of rehabilitation imposes a heavy burden on the military justice system because this goal is often in conflict with the goal of deterrence. The civilian system of criminal justice, which is not faced with the pressing requirement to return men to duty, has had little if any success in attaining this goal of rehabilitation and, in fact, its almost total failure in this regard represents a sad commentary on civilian justice.

The importance of preserving military manpower also means that the system of military justice must operate with reasonable promptness. Undue delay in the disposition of criminal cases is harmful to any system. In the military, morale and discipline can be adversely affected by delay. Equally important, needed manpower may be prevented from performing its assigned mission. A separate system of military justice allows speedier justice, because it is integrated into the operation of the military as a whole.

A system of criminal justice must be an integral part of the armed forces because they may be deployed anywhere in the world on short notice. They cannot depend, for example, on United States criminal courts which are many thousands of miles away and, for the most part,

16. *Id.* art. 89, 10 U.S.C. § 889 (1964).

17. *Id.* art. 90, 10 U.S.C. § 890 (1964).

18. *Id.* art. 91, 10 U.S.C. § 891 (1964).

already bogged down. The administration of justice must be possible within a combat zone as well as on a peacetime installation.

A system of justice which is an integral part of the armed forces permits American legal principles and our Constitution to follow our servicemen wherever they are deployed. It permits our government to enter into agreements with foreign governments so that American servicemen accused of crimes in foreign countries may be tried according to American, rather than foreign, principles of law.

Exercise of military jurisdiction over civilian type offenses has been the subject of a recent Supreme Court decision and numerous journal articles.¹⁹ Jurisdiction over civilian type offenses is required in foreign areas and in numerous situations within our own country. The military is a social community as well as a military organization. It must deal with antisocial behavior in the same way that the civilian community does. Antisocial behavior may occur on a military post isolated from a civilian community and its courts. Because those on military posts often live closer to one another than people in civilian communities, dependence on civilian courts to understand and enforce the needs of the military community appears unrealistic. A soldier who assaults another soldier, for example, often can be rehabilitated and returned to duty within a short period of time if his case can be handled locally and processed rapidly. Ability to handle civilian type offenses also permits the military accused to be available for duty or performing his duty while awaiting trial.

COMPARISON

In order to compare military justice with civilian criminal justice, it is necessary to understand the hierarchy of military tribunals and the military concept of nonjudicial punishment. A military commander is responsible for developing and maintaining good order and discipline and a certain level of proficiency within his organization. Learning and developing military discipline does not differ much from learning or teaching any discipline, skill, or precept. In all learning, correction of the learner is indispensable. How much and what type of correction is used is part of the ability to teach and part of what is called leadership

19. See *O'Callahan v. Parker*, 395 U.S. 258 (1969). See, e.g., Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1 (1969); Note, *Constitutional Law: Non-Military Offense Committed Off Post While on Leave Not Justiciable by Court-Martial*, 18 KAN. L. REV. 335 (1970).

in the military. The military commander needs the widest possible authority to correct individuals, but some types of corrective action are recognized as being so severe that they should not be entrusted solely to the discretion of one individual. The system of military justice recognizes the commander's need to have some method of imposing minor punishment, as differentiated from other forms of corrective action, with few procedural technicalities. Starting with punishment under Article 15²⁰ of the Code and progressing to the general court-martial, individual discretion is more and more circumscribed and procedural safeguards are elaborated as maximum punishments increase. Under Article 15, the commander may impose, for minor offenses, forfeitures of ½ month's pay for two months, reduction in rank, restriction, and correctional custody. Nonjudicial punishment under Article 15 is not a conviction for purposes of civil service and other job applications or for any other purposes in civilian life. The accused may refuse this punishment and demand trial by court-martial in all but rare circumstances.²¹ Procedures for presenting evidence in defense, mitigation, and extenuation are provided,²² as are procedures for appealing the punishment.²³ It is clear that the adversary system does not exist under Article 15, but the punishments are minor, the punishment is not a conviction of record, and avenues of appeal are provided. It is analogous to the civilian procedure of permitting forfeiture of collateral.

The summary court-martial is a trial by one commissioned officer who need not be a lawyer. If the accused is convicted, it will be a conviction of record. Punishment may include confinement up to forty-five days and may include reduction in grade and forfeitures not to exceed 2/3 of one month's pay.²⁴ No counsel is furnished for the accused or the prosecution, but the accused is advised of his legal rights and that he may refuse trial by summary court-martial.²⁵ Trial by summary court-

20. UCMJ art. 15, 10 U.S.C. § 815 (Supp. V, 1970), setting forth in minute detail the commanding officer's authority for nonjudicial punishment for minor infractions under regulations prescribed by the President and the Secretaries of the military departments.

21. *Id.* art. 15(a), 10 U.S.C. § 815(a) (1964).

22. *See, e.g.,* Army Regulation 27-10, ch. 3 (Nov. 26, 1968) [hereinafter cited as AR]. Although counsel is not appointed to represent the accused, the accused may, and frequently does confer with a judge advocate before agreeing to accept the punishment.

23. UCMJ art. 15, 10 U.S.C. § 815(e) (Supp. V, 1970).

24. *Id.* art. 20, 10 U.S.C. § 820 (Supp. V, 1970).

25. *Id.* While counsel is not routinely appointed, the accused frequently confers with legal counsel prior to accepting trial, and may have retained counsel to represent him at the trial.

martial has many of the attributes of trial by a justice of the peace or a federal magistrate.²⁶

Although the special and general court-martial will be discussed in more detail later, a brief statement is warranted at this point. The special court-martial may impose confinement not to exceed six months, forfeiture of 2/3 pay for a like period, reduction in rank, and, under certain circumstances, a bad conduct discharge.²⁷ The general court-martial may impose any punishment permitted under the Uniform Code of Military Justice including, for appropriate offenses, death, life imprisonment, dishonorable discharge, or dismissal in the case of officers.²⁸

Civilian criminal justice systems provide a standard for comparison in discussing the administration of military justice. There is a tendency, however, to accept the civilian model as an ideal. Our constitutional and statutory provisions on criminal trials have proved generally workable, fair, and effective over the course of our history. But it would be erroneous to condemn a system of criminal justice simply because it differed from that standard, particularly where it also has constitutional underpinnings.²⁹ A committee of the American Bar Association in its project on Standards for Criminal Justice has attempted to formulate a set of standards which outline what a system of criminal justice ought to be. The standards represent the thinking of experienced legal minds, including those of defense counsel, prosecutors, and judges. Many of the standards have been adopted by the American Bar Association. The objectivity of a comparison of the military justice system with civilian criminal justice is increased by also comparing military justice with these standards. In fact, the Uniform Code of Military Justice, far ahead of our fifty states, has already adopted most of the applicable standards by amendments to the Military Justice Act of 1968.

26. *See, e.g.*, 18 U.S.C. §§ 3401, 3402 (Supp. V, 1970).

27. UCMJ art. 19, 10 U.S.C. § 819 (Supp. V, 1970).

28. *Id.* art. 18, 10 U.S.C. § 818 (Supp. V, 1970). The punitive articles of the UCMJ generally state that punishment shall be as a court-martial may direct. An exception involves such offenses as murder and mutiny where the death penalty is specifically stated to be a possible punishment. UCMJ art. 56, 10 U.S.C. § 856 (1964) provides that punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense. Presidential limits are prescribed by Executive Order in the form of the Manual for Courts-Martial. MCM ¶ 127c sets out the table of maximum punishments for offenses. The death penalty may not be prescribed by the President for an offense unless authorized by the Code.

29. *See* notes 3-5 *supra* and accompanying text.

General

In the military, as in our civilian courts, the burden of proving guilt beyond a reasonable doubt is on the prosecution. The Fifth Amendment guarantee against compulsory self-incrimination applies in military courts and is buttressed by an article of the Uniform Code of Military Justice³⁰ which has been interpreted by the Court of Military Appeals to encompass even broader protections than the Fifth Amendment.³¹ The Sixth Amendment right to a speedy trial is also guaranteed in the military,³² and the period of delay tolerated is considerably shorter than in civilian practice.³³

Right to Counsel

The commentary on the *Standards Relating to Providing Defense Services* drafted by the American Bar Association's project on Minimum Standards for Criminal Justice begins:

Representation by counsel is crucial to the effectuation of all the other procedural protections which the legal system offers to the defendant. If those protections are to be meaningful and not merely a sham, it is essential that each defendant have legal assistance to realize their intended benefits.³⁴

The American Bar Association standards recommend that counsel be provided for indigent defendants for all offenses which are punishable by "loss of liberty, except those types of offenses for which such punishment is not likely to be imposed. . . ." ³⁵ These standards go beyond the rule currently prevailing in most jurisdictions. The Supreme Court has denied certiorari in cases raising the right to counsel issue in the misdemeanor setting.³⁶ One federal circuit court has stated that a right

30. UCMJ art. 31, 10 U.S.C. § 831 (1964).

31. See, e.g., *United States v. Mewborn*, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968); *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967). See Moyer, *supra* note 1, at 125-26.

32. UCMJ art. 10, 10 U.S.C. § 810 (1964).

33. See Moyer, *supra* note 1 at 117-20. See generally, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL (Approved Draft 1968).

34. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 13 (Approved Draft 1968) [hereinafter cited as PROVIDING DEFENSE SERVICES].

35. *Id.* at 9 (Standard 4.1).

36. See, e.g., *Beck v. Winters*, 407 F.2d 125 (8th Cir.), *cert. denied*, 395 U.S. 963 (1969).

to free counsel exists in a situation where the possible punishment is imprisonment for less than six months.³⁷ However, the general rule is to the contrary.³⁸ The military rule is significantly more liberal than that followed in most jurisdictions and even surpasses the American Bar Association standard in one important respect: in the military, counsel is provided without regard to the financial situation of the accused. An accused, otherwise entitled to have counsel appointed for him, may have such counsel even if he can afford to hire his own lawyer and even if he, in fact, does hire one. In the general court-martial, every accused is furnished a lawyer, who must be a member of the bar certified for duty by The Judge Advocate General of an armed force, regardless of the offense for which he is being tried and the possible maximum punishment.³⁹ This rule has been followed in the military since the enactment of the Uniform Code in 1950. The military right to counsel was expanded on August 1, 1969, the effective date of the

37. *MacDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965).

38. *See, e.g.*, 18 U.S.C. § 3006A (1964), *as amended* (Supp. V, 1970). This section provides for the establishment of plans for the provision of counsel in all cases other than those involving petty offenses as defined in 18 U.S.C. § 1, *i.e.*, those involving possible punishment in excess of six months in jail, or a \$500 fine, or both.

39. UCMJ art. 27, 10 U.S.C. § 827 (Supp. V, 1970). Judge advocates must be members of the bar admitted to practice before they enter active duty. Their academic records and personal qualifications are carefully screened before they are accepted for commissioning as military lawyers. Army judge advocates attend The Judge Advocate General's School, Charlottesville, Virginia, before their first assignment, for a course covering all aspects of military practice with emphasis on military justice, particularly trial practice and advocacy before courts-martial. Navy and Marine judge advocates attend a similar course at the Naval Justice School, Newport, Rhode Island, and Air Force judge advocates attend a military law course at the Air University, Maxwell Air Force Base, Montgomery, Alabama. In January 1, 1971, the following numbers of judge advocates were on duty with the services: Army—1777, Air Force—1205, Navy—766, Marine Corps—364. For fiscal year 1969, the court-martial case load of the services was as follows (Source: ANNUAL REPORT OF THE U.S. COMA AND TJAG OF THE ARMED FORCES, AND THE GENERAL COUNSEL, DOD, FOR 1969):

| | <i>Army</i> | <i>Air Force</i> | <i>Navy & MC</i> |
|------------------------------|---------------|------------------|----------------------|
| Summary Courts Martial | 14,241 | 755 | 13,078 |
| Special Courts-Martial | 59,597 | 1,733 | 16,239 |
| General Courts-Martial | 2,482 | 301 | 929 |
| | <u>72,243</u> | <u>2,789</u> | <u>30,246</u> |

The JAG Corps' conduct courses and instructional seminars for their lawyers. Army career lawyers, for example, are generally required to attend a one-year military law course at the JAG School, Charlottesville, Virginia. Military lawyers from the other services may also attend this course. The Judge Advocate General's School also conducts resident and correspondence courses for active duty and reserve military lawyers in many specialized legal areas.

Military Justice Act of 1968.⁴⁰ In all special courts-martial which may render a punitive discharge, the rule for general courts-martial is now followed.⁴¹ In other special courts-martial, the accused must be informed of his right to request that he be represented by a qualified lawyer and must be provided with such counsel if he so requests, unless qualified counsel cannot be obtained because of physical or military conditions.⁴² This exception was provided to permit trial by court-martial on board ships or at isolated locations where counsel could not be obtained. The legislative history indicates that the exception is to be narrowly construed.⁴³ The Manual for Courts-Martial implements this view⁴⁴ and some of the service regulations have taken an even narrower approach. In the Army, for example, the exception is not available within the United States, and outside the United States is available only after attempts to obtain counsel from higher commands have failed.⁴⁵ Counsel are not provided for summary courts-martial where loss of liberty is possible,⁴⁶ but the accused may refuse trial by summary court-martial. This right of refusal effectively gives the accused the right to legal counsel in these cases since he may have counsel in the event he is tried by special court-martial.⁴⁷ It should be kept in mind that the maximum punishment which may be adjudged by a special court-martial is six months' confinement, and for many offenses the maximum punishment is significantly less.⁴⁸ Military counsel compare quite favorably with public defenders who represent accused. They are familiar with the criminal law and, after a few months of service, generally have more trial experience than the average civilian lawyer. The military system of providing counsel is superior to systems which assign members of the bar without regard to their criminal law experience and often compensate them inadequately.⁴⁹

Right to Counsel in Pretrial and Post-trial Proceedings

The right to counsel has been extended by the Supreme Court not

40. UCMJ art. 27(c), 82 Stat. 1335, 1337 (1968), 10 U.S.C. § 827(c) (Supp. V, 1970).

41. *Id.* art. 19, 10 U.S.C. § 819 (Supp. V, 1970).

42. *Id.* art. 27(c), 10 U.S.C. § 827(c) (Supp. V, 1970).

43. S. REP. No. 1601, 90th Cong., 2d Sess. 8 (1968).

44. MCM ¶ 6c.

45. AR 27-10, para. 2-14 (May 27, 1969).

46. See notes 24, 25 *supra* and accompanying text.

47. UCMJ art. 20, 10 U.S.C. § 820 (Supp. V, 1970).

48. See, MCM ¶ 127c.

49. See generally PROVIDING DEFENSE SERVICES, *supra* note 34. See also note 39, *supra*.

only to less and less serious offenses,⁵⁰ but also in time, prior to and after the trial itself.⁵¹ The American Bar Association standards recommend that counsel be appointed for an accused as soon as is feasible after he is taken into custody.⁵² The rule of *Escobedo v. Illinois*,⁵³ which requires that a suspect being interrogated be allowed to consult with his lawyer if he desires, has been followed in the military since 1957.⁵⁴ Article 31 of the Uniform Code of Military Justice⁵⁵ since 1951 has provided that prior to questioning, an accused must be advised of the offenses of which he is suspected, that he has a right to remain silent, and that anything he says may be used against him. In 1966, the Supreme Court in *Miranda v. Arizona*⁵⁶ held that prior to custodial interrogation an accused must be advised of his right to have counsel present at the interrogation and that counsel would be provided if he could not afford one. In *United States v. Tempia*,⁵⁷ the Court of Military Appeals applied this counsel requirement to the military. Since indigency is not a requirement for provision of counsel in the military, the latter part of the *Miranda* holding was unnecessary in the military. Military accused are told that military counsel will be provided for them and that they may hire civilian counsel.⁵⁸ With the addition of the *Miranda* counsel requirement, the Article 31 warning has become broader than its civilian equivalent. The warning must be given to an accused before an official may question him or request any statement. It thus encompasses some situations which are not included in custodial interrogation.⁵⁹ The Article 31 requirement that an accused be advised of the offense or offenses of which he is suspected allows an accused to answer questions more intelligently.

The American Bar Association has recommended that counsel be provided at every stage of the proceedings, including sentencing, appeal,

50. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

51. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Douglas v. California*, 372 U.S. 353 (1963).

52. PROVIDING DEFENSE SERVICES, *supra* note 34, at 9 (Standard 5.1).

53. 378 U.S. 478 (1964).

54. See *United States v. Rose*, 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957); *United States v. Gunnels*, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).

55. 10 U.S.C. § 831 (1964).

56. 384 U.S. 436 (1966).

57. 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

58. Army Graphic Training Aid 19-6-1, Procedure for Informing Accused or Suspect Person of His Rights (Sept. 1, 1967).

59. UCMJ art. 31(b), 10 U.S.C. § 831(b) (1964); see, e.g., *United States v. Souder*, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959).

and post-conviction review.⁶⁰ Every general court-martial conviction which results in a punitive discharge or confinement for one year or more is automatically reviewed by a service Court of Military Review.⁶¹ Every special court-martial conviction which adjudges a bad conduct discharge is also reviewed automatically by a Court of Military Review. In some of these cases, further review by the United States Court of Military Appeals is mandatory; in the remainder it is discretionary with that court.⁶² In all of these situations, the accused may have a lawyer free of charge, regardless of his financial status, to represent him on appeal.⁶³ Decisions of the Supreme Court require the appointment of counsel for the appeal of indigent defendants.⁶⁴ The American Bar Association standards further recommend that "[c]ounsel initially appointed should continue to represent the defendant through all stages of the proceedings unless a new appointment is made because geographical considerations or other factors make it necessary."⁶⁵ In the military, representation before the Courts of Military Review and the Court of Military Appeals is generally by a lawyer officer assigned to a service appellate review activity and not by the counsel who defended the accused at trial. This arrangement is necessitated by the location of these courts in the Washington, D. C. area. Representation on appeal by a different counsel may provide better representation. An appellate counsel who did not try the case will be willing, where appropriate, to attack the adequacy of the representation at the trial.⁶⁶ The Uniform Code clearly provides that the duties of counsel do not end with the trial. Article 38(c)⁶⁷ provides that

[i]n every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of an accused on review, including any objection to the contents of the record which he considers appropriate.

In recent legislation, proposals have been made that military counsel be permitted to represent military accused in collateral proceedings

60. PROVIDING DEFENSE SERVICES *supra* note 34, at 10 (Standard 5.2).

61. UCMJ art. 66, 10 U.S.C. § 866(b) (Supp. V, 1970).

62. *Id.* art. 67, 10 U.S.C. § 867 (Supp. V, 1970).

63. *Id.* art. 70, 10 U.S.C. § 870 (Supp. V, 1970).

64. *See Douglas v. California*, 372 U.S. 353 (1963).

65. PROVIDING DEFENSE SERVICES *supra* note 34, at 10 (Standard 5.2).

66. *See, e.g., United States v. Broy*, 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964).

67. UCMJ art. 38(c), 10 U.S.C. § 838(c) (1964).

outside the military justice system.⁶⁸ Military counsel already represent accused on habeas corpus and other extraordinary writ proceedings to the Court of Military Appeals.⁶⁹ It is believed that few situations should warrant relief outside the military justice system, but it should be available where counsel believe it necessary.

Pretrial Procedures

The Fifth Amendment specifically exempts cases arising in the land and naval forces from the provisions relating to grand jury indictment or presentment.⁷⁰ Military justice has been criticized because it does not embody a grand jury procedure.⁷¹ Military procedure does provide for a pretrial investigation which in many respects is superior to a grand jury. Such a procedure is required before every general court-martial.⁷² Before the actual investigation takes place, the accused is formally notified of the charges to be investigated, of the identity of the accuser, and of the witnesses expected to be called.⁷³ The accused has the right to be present during the entire investigation, to have military counsel appointed for him, and to hire his own civilian counsel.⁷⁴ If the case goes to trial, the accused is provided with a copy of the formal investigation report, including statements of testimony taken and other material considered by the investigating officer.⁷⁵

The investigating officer is generally a layman (as are members of grand juries), but he may be a lawyer.⁷⁶ He investigates the matters set forth in the formal charges to determine their truth.⁷⁷ In addition, the investigating officer recommends appropriate disposition of the charges: trial by general, special, or summary court-martial; Article 15 punishment; or other recommendation.⁷⁸ The Manual for Courts-Martial specifically provides that the investigating officer's recommendation

68. S. 4191, 91st Cong., 1st Sess., § 2 (1970) (proposed UCMJ art. 38(c)).

69. UCMJ art. 70, 10 U.S.C. § 870 (Supp. V, 1970). See *Noyd v. Bond*, 295 U.S. 683 (1969) (recognizing the power of the Court of Military Appeals to issue extraordinary writs).

70. See note 5, *supra*, and accompanying text.

71. See generally, *O'Callahan v. Parker*, 395 U.S. 258 (1969).

72. UCMJ art. 32, 10 U.S.C. § 832 (1964).

73. *Id.*; MCM ¶ 34b.

74. UCMJ art. 32(b), 10 U.S.C. § 832(b) (1964).

75. *Id.*

76. MCM ¶ 34a.

77. *Id.*

78. *Id.*

is not binding.⁷⁹ The authority who is charged with convening courts-martial may disagree with the investigating officer's recommendation.

Grand jury procedures are significantly less favorable to an accused. Federal and state grand jury proceedings are generally secret.⁸⁰ The accused has no right to be present at the grand jury proceedings, and hence no right to be represented by counsel or to cross-examine witnesses or present his own evidence.⁸¹ It has long been held that states are not required to commence the criminal process by grand jury indictment⁸² and may employ some equally fair alternative procedure. Even federal prosecutions for minor offenses are not required to proceed by grand jury indictment.⁸³

The Article 32 investigation has been praised by some who have harshly criticized other features of the military justice system.⁸⁴ A recent legislative proposal has suggested extending a variation of it to all courts-martial.⁸⁵

Discovery

In the *Standards Relating to Discovery and Procedure Before Trial (Tentative Draft)*, the American Bar Association Project on Standards for Criminal Justice recommends "more permissive discovery practices" than provided in most jurisdictions in the United States.⁸⁶ The Advisory Committee on the draft felt that broad pretrial disclosure of the prosecution's case was the key to satisfying procedural objectives of overriding significance to criminal justice.⁸⁷ Among the goals of full pretrial discovery are providing the accused sufficient information to make an informed plea, permitting thorough preparation and minimizing surprise at trial, and effecting economies in time and money.⁸⁸

Military discovery is almost unlimited and comes nearest to the American Bar Association standards. The Article 32 investigation serves as an excellent discovery device in the general court-martial. In

79. *Id.* ¶ 35.

80. *See, e.g.*, FED. R. CRIM. P. 6(e); *see Moyer, supra* note 1, at 110.

81. *See, e.g.*, FED. R. CRIM. P. 6(d); *see Moyer, supra* note 1, at 111.

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

83. *Duke v. United States*, 301 U.S. 492 (1937).

84. Rothblatt, *supra* note 1, at 3; Sherman, *Military Injustice*, 74 CASE AND COMMENT 44 (July-August 1968).

85. S. 4191, 91st Cong., 2d Sess., § 2 (1970).

86. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 1 (Tentative Draft 1969).

87. *Id.* at 2.

88. *Id.* at 11 (Standard 1.1).

producing its case, the government will reveal its documentary and real evidence and its witnesses, and the witnesses may be cross-examined under oath.⁸⁹ In all courts-martial, the defense is furnished with a list of persons chosen to serve as members of the court panel, the names of witnesses to be called by the prosecution, and all documentary and real evidence to be introduced.⁹⁰ Thus, the defense has the opportunity to interview all witnesses and review all the evidence prior to trial.⁹¹ The defense also is given the opportunity to inspect the entire case file, statements of interviewed witnesses, and the original report of investigation.⁹²

These rights should be compared with those prevailing in the federal courts, whose discovery procedures are substantially more liberal than those obtaining in most states.⁹³ In federal practice, there is a right to very limited disclosure of grand jury proceedings.⁹⁴ Real and documentary evidence and other items that are known to the defense may be subpoenaed.⁹⁵ The accused may examine written or recorded statements made by him, medical and scientific test results, and his own recorded testimony before a grand jury.⁹⁶ He may also inspect and copy "books, papers, documents, tangible objects, buildings or places which are within the possession, custody, or control of the Government, upon a showing of a materiality to the preparation of his defense and that the request is reasonable."⁹⁷ Discovery under this rule is clearly not un-

89. See note 75 *supra*, and accompanying text.

90. MCM ¶ 44*b*.

91. *Id.* ¶¶ 34*d*, 115*c*.

92. MCM ¶ 44*b*. In seeking acceptance of the ABA Standards on Pretrial Discovery, the extent of discovery is often frustrated by fear of misuse of information furnished. This misuse does not occur between lawyers motivated by high ethical considerations. Information involving important national security matters, for example, must be protected. The purpose of disclosure is to prepare for trial and has as its objective the establishment of truth. Disclosure was never intended to enable counsel to seek headlines in advance of trial (see DR 7-107 of the ABA Code of Professional Responsibility, which flatly prohibits such conduct). If information disclosed is prematurely released or improperly used, sentiment could very well crystallize on restricting disclosure. Congress in enacting the Organized Crime Control Act of 1970 in Title VII recognized the inability to protect information disclosed even under court rule, and modified the ruling in *Alderman v. United States*, 394 U.S. 165 (1968), by providing for *in camera* inspection of specified material to determine relevancy to the defense. See S. REP. NO. 617, 91st Cong., 1st Sess. 64-68 (1968); H.R. REP. NO. 1549, 91st Cong., 2d Sess. 51-52 (1969).

93. See generally Moyer, *supra* note 1, at 114-16.

94. FED. R. CRIM. P. 6(e).

95. *Id.* 17.

96. *Id.* 16.

97. *Id.* 16(b).

limited. Discretion remains in the trial court to deny discovery in certain situations,⁹⁸ and the accused subjects himself to discovery by using the rule; production by the government can be made contingent upon disclosure by the accused.⁹⁹

Witnesses

Some criticism of the military justice system has been directed at the procedures by which the defense secures process for obtaining evidence and witnesses. Article 46 of the Uniform Code of Military Justice provides that the trial counsel, defense counsel, and court-martial shall have equal opportunity to obtain witnesses and other evidence.¹⁰⁰ Paragraph 115 of the Manual for Courts-Martial provides that requests for witnesses by the defense are submitted to and acted upon by the trial counsel. It is this paragraph which forms the basis for complaints about the military process. It provides that

. . . when there is disagreement between the trial counsel and the defense counsel as to whether the testimony of a witness so requested would be necessary, the matter will be referred for decision to the convening authority or the military judge or the president of a special court-martial without a military judge according to whether the question arises before or after the trial begins. . . . If the convening authority determines that the witness will not be required to attend the trial, the request may be renewed at the trial for determination by the military judge or the president of the special court-martial without a military judge. . . .

Recently introduced bills have proposed that witness requests be submitted to the military judge rather than the trial counsel, ostensibly to eliminate the process of having the prosecution approve requests for defense witnesses.¹⁰¹ Criticism of this aspect of military justice is without foundation. The Court of Military Appeals has held that an accused is entitled to personal appearance at trial of all material witnesses.¹⁰² Since requests for witnesses which are contested are ulti-

98. See *Meyer v. United States*, 396 F.2d 279 (8th Cir. 1968); *Hemphill v. United States*, 392 F.2d 45 (8th Cir. 1968).

99. FED. R. CRIM. P. 16(c).

100. 10 U.S.C. § 846 (1964).

101. S. 4191, 91st Cong., 2d Sess., § 2 (1970); S. 4175, 91st Cong., 2d Sess., § 1 (1970).

102. *United States v. Sweeny*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); *United States v. Hawkins*, 6 U.S.C.M.A. 135, 19 C.M.R. 261 (1955).

mately passed upon by the military judge,¹⁰³ it is clear that the submission to the trial counsel is merely a procedural device. It must be kept in mind that all these procedures deal only with witnesses for whom the defense desires to use compulsory process, which in the military involves the funding by the government of all expenses, including costs of service, travel expenses, food and lodging allowances, daily attendance fees, and expert witness fees.¹⁰⁴ All these expenses are borne by the government without regard to the accused's financial status, the number of witnesses, or the distances involved. In addition, nationwide service of process is available for civilian witnesses;¹⁰⁵ military witnesses may be brought from anywhere in the world. A requirement that a witness' testimony be shown to be material is not unreasonable since costs are borne by the government. A similar requirement prevails in federal practice. Under Federal Rule of Criminal Procedure 17(b), when the government bears the expense of producing a defense witness, the defense must demonstrate that the presence of the witness is necessary to an adequate defense. None of those procedures precludes military defense counsel from producing a witness on his own and attempting to demonstrate the materiality of his testimony.

Appellate Review

Appellate review in the military is provided at least once after every court-martial conviction and at no cost to the accused. Every conviction by summary court-martial and special court-martial which does not include a punitive discharge is reviewed for legal sufficiency by the convening authority and by a lawyer.¹⁰⁶ The convening authority may mitigate the sentence of the court-martial and may disapprove findings because of legal errors.¹⁰⁷ If the special court-martial sentence includes a bad conduct discharge, the review is more extensive. The case is reviewed by the officer who convened the court and by the officer exercising general court-martial jurisdiction after he has received the written advice of his legal officer.¹⁰⁸ Both convening authorities

103. MCM ¶ 115.

104. *Id.*

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

106. *Id.* art. 65(c), 10 U.S.C. § 865(c) (Supp. V, 1970).

107. *Id.* art. 64, 10 U.S.C. § 864 (Supp. V, 1970).

108. *Id.* arts. 61, 65, 10 U.S.C. §§ 861, 865 (Supp. V, 1970). In the Army, a special court-martial which may adjudge a Bad Conduct Discharge must be convened by a general court-martial convening authority. AR 27-10, para. 2-16 (May 27, 1969). In these cases only the initial convening authority and his judge advocate perform the field review.

may mitigate the sentence and disapprove the findings on the basis of legal errors. After these reviews, if the bad conduct discharge has been approved, the case is reviewed automatically by the Court of Military Review of the service of which the accused is a member.¹⁰⁹ The Court of Military Review may sit in panels of three judges.¹¹⁰ The accused is entitled to representation by a military lawyer free of charge and is provided with a transcript of his trial.¹¹¹

In general courts-martial the conviction is reviewed by the convening authority after he receives the advice of his legal officer.¹¹² The convening authority may disapprove the findings or a part thereof if legal errors are found and may mitigate the sentence. If the approved sentence does not include a punitive discharge or confinement for one year or more, the case is then reviewed in the Office of The Judge Advocate General and if found unsupported in law or if The Judge Advocate General so directs, the case is reviewed by the Court of Military Review.¹¹³ Cases involving punitive discharges, a year or more confinement, or a general or flag officer are reviewed automatically by the Court of Military Review.¹¹⁴ When the case is reviewed by the Court of Military Review, the accused is provided with a lawyer¹¹⁵ and a transcript of the trial.¹¹⁶ If the accused is a general or flag officer, or if the approved sentence extends to death, the case must be reviewed by the civilian United States Court of Military Appeals and the sentence cannot be executed until approved by the President.¹¹⁷

In addition to the automatic appellate rights detailed above, a military accused has certain appellate procedures which he may pursue on his own initiative. Article 69 of the Uniform Code of Military Justice¹¹⁸ permits an accused, convicted by summary court-martial or special court-martial which did not adjudge a bad conduct discharge (and thus was not reviewed by a Court of Military Review), to petition The

109. UCMJ art. 66(b), 10 U.S.C. § 866(b) (Supp. V, 1970).

110. *Id.* art. 66(a), 10 U.S.C. § 866(a) (Supp. V, 1970).

111. MCM ¶¶ 82g(1), 102a, 102b.

112. UCMJ art. 61, 10 U.S.C. § 861 (1964).

113. *Id.* art. 69, 10 U.S.C. § 869 (Supp. V, 1970).

114. *Id.* art. 66, 10 U.S.C. § 866 (Supp. V, 1970).

115. *Id.* art. 70, 10 U.S.C. § 870 (Supp. V, 1970).

116. MCM ¶ 82g(1).

117. UCMJ arts. 67(b)(1), 71(a), 10 U.S.C. §§ 867(b)(1), 871(a) (Supp. V, 1970). Judges of the Court of Military Appeals are appointed by the President with the advice and consent of the Senate for 15-year terms. Judges are appointed from "civil life." UCMJ art. 67(a), 10 U.S.C. § 867(a) (Supp. V, 1970).

118. *Id.* art. 69, 10 U.S.C. § 869 (Supp. V, 1970).

Judge Advocate General for a review of his case. An accused under Article 73¹¹⁹ is permitted to petition The Judge Advocate General for a new trial within two years of his conviction on the grounds of newly discovered evidence or fraud on the court. In a case reviewed by the Court of Military Review, the accused may petition the United States Court of Military Appeals for review. He will be provided with military counsel free of charge for the preparation of the petition and for the actual review.¹²⁰

Appellate review in the military is significantly different from that found in most civilian jurisdictions. First, every authority who reviews a conviction up through the Court of Military Review must be convinced beyond a reasonable doubt of the guilt of the accused.¹²¹ The reviewing authority is obligated to fully weigh the evidence and judge the credibility of witnesses. Review can only work to the advantage of the accused, except for appeal of questions of law certified from a Court of Military Review to the Court of Military Appeals.

Military law also includes provision for appellate review of sentences. In the *Standards Relating to Appellate Review of Sentences*, the American Bar Association strongly recommends provision for appellate review of sentences, and notes that it is now available only in a minority of jurisdictions.¹²² The purposes of appellate review of sentences, as stated in the American Bar Association standards, are the correction of excessive sentences, facilitation of rehabilitation by affording the offender an opportunity to assert grievances he may have regarding his sentence, promotion of respect for law by correcting abuses of the sentencing, and the promotion of just and rational sentencing.¹²³

In the military, sentences may only be adjusted downward by the reviewing authority. The American Bar Association standards are equivocal on this point.¹²⁴ One of the alternative ABA standards would allow the reviewing court to increase the sentence, but only when sentence review is initiated by the defendant.¹²⁵

119. *Id.* art. 73, 10 U.S.C. § 873 (Supp. V, 1970).

120. *Id.* art. 70, 10 U.S.C. § 870 (Supp. V, 1970).

121. *See*, *United States v. Arthur*, 9 U.S.C.M.A. 81, 25 C.M.R. 343 (1968); *United States v. Acker*, 9 U.S.C.M.A. 80, 25 C.M.R. 342 (1958); MCM ¶¶ 86b(1)(c), 100a.

122. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 13 (Approved Draft 1968).

123. *Id.* at 21 (Standard 1.2).

124. APPELLATE REVIEW OF SENTENCES, AMENDMENTS RECOMMENDED BY THE SPECIAL COMMITTEE ON MINIMUM STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE (March 1968).

125. *Id.* at 2.

Bail

With the enactment of the Military Justice Act of 1968, military criminal law now has provisions for release from confinement which parallel civilian provisions for release on bail. None of these provisions require posting of collateral or bond. Military law has long had provisions which permit an accused to be free from confinement pending trial. Paragraph 20c of the Manual for Courts-Martial provides that "confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense."

Prior to enactment of the Military Justice Act of 1968, no specific procedure existed for releasing persons from confinement pending appellate review of their convictions. Commanders were reluctant to release convicts from confinement pending appellate review because their sentences ran from the date adjudged whether served or not.¹²⁶ The Code now provides that a commander may "defer" the service of a sentence to confinement by releasing an accused pending completion of appellate review.¹²⁷ The discretion to release rests with the appropriate convening authority.¹²⁸

Sentencing

In its *Standards Relating to Sentencing Alternatives and Procedures*,¹²⁹ the American Bar Association has made a number of proposals relating to the important and difficult task of sentencing an offender after conviction. The standards recognize that sentencing is extremely difficult and should be handled by the trial judge rather than the jury.¹³⁰ Prior to enactment of the Military Justice Act of 1968, all sentencing at courts-martial was done by the court-members. The Military Justice Act amended the Uniform Code of Military Justice to provide that at all general courts-martial, except in capital cases,¹³¹ and at all special courts-martial to which a military judge has been detailed,¹³² the accused

126. UCMJ art. 57, 10 U.S.C. § 857 (Supp. V, 1970).

127. *Id.* art. 57(d), 10 U.S.C. § 857(d) (Supp. V, 1970).

128. *Id.*

129. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft 1968).

130. *Id.* at 13 (Standard 1.1).

131. UCMJ art. 18, 10 U.S.C. § 818 (Supp. V, 1970).

132. *Id.* arts. 18, 26(a), 10 U.S.C. §§ 818, 826(a) (Supp. V, 1970). The Code gives the authority convening a special court, unless it adjudges a bad conduct discharge, discretion as to whether or not a military judge shall be detailed to the court. The pur-

may request trial by the military judge alone. When the accused is tried by the judge alone, the judge determines guilt or innocence and, if the accused is convicted, imposes sentence. If the accused does not waive trial by court-members, the sentence as well as the guilt or innocence is determined by court-members. A bill introduced during the last session of Congress¹³³ proposed that sentencing power be transferred to the military judge even where the accused does not request trial by military judge alone. Such a change in the Uniform Code would bring military practice more closely in line with most civilian jurisdictions and with the American Bar Association recommendations. Sentencing involves the extremely difficult job of determining the appropriate sentence for the offender and the particular crime he has committed, and assuring that the deterrent function of the law is carried out. This is an extremely difficult task for the jury member to perform, because he does not have the experience gained by the judge who presides over many cases involving different offenders and offenses.

Judges

The extensive use of the Military Justice Act's provisions for trial by judge alone¹³⁴ highlights the importance of the independent military judge concept which was introduced into statutory law by the Military Justice Act of 1968.¹³⁵ The independence of the military judge protects against the possibility of unlawful influence by the command on the military justice process. The Code requires that military judges of general courts-martial be designated for such duty by The Judge Advocate General and be directly responsible to The Judge Advocate General or his designee.¹³⁶ What this means in practice is that military judges of general courts-martial must be in a chain of command that rises di-

pose of this discretion was a realization that military judges would not always be available. The Code further provides an exception for detailing a military judge to a court-martial which adjudges a bad conduct discharge. UCMJ art. 19, 10 U.S.C. § 819 (Supp. V, 1970). By regulation the Army has severely limited these exceptions. See AR 27-10, paras. 2-15,-16 (May 27, 1969).

133. S. 4191, 91st Cong., 2d Sess. § 2 (1970).

134. See, REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION, PURSUANT TO THE UCMJ, 20 (Jan. 1, 1969 to Dec. 31, 1969); see Moyer *supra* note 1, at 137, n. 244.

135. UCMJ art. 26(c), 10 U.S.C. § 826(c) (Supp. V, 1970). The "independent judiciary" concept was implemented by regulation in the Army in 1968. See Mounts and Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470, 471 (1969).

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

rectly to The Judge Advocate General and is outside the chain of command of the authority who convenes the court-martial. The military judge of a general court-martial is rated on his performance of duty by officers in the military judge chain of command. The Uniform Code does not require that military judges of special courts-martial be completely independent of the command.¹³⁷ Paragraph 38e of the Manual for Courts-Martial provides, however, that the convening authority shall not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to his performance of duty as a military judge. In the case of judges of general courts-martial, the convening authority is not permitted to rate the judge on the performance of any of his duties.¹³⁸ Viewing these provisions as a whole, they represent a compromise. The ideal would be to have the special court-martial judge be a member of an "independent judiciary," but the problems of providing judges for the vast number and scattered locations of special courts-martial are formidable.¹³⁹ The independent judiciary concept should be extended to include those judges who preside over special courts-martial, and law or regulations should require that these independent judicial officers preside over all special, as well as general, courts-martial. Placing all judges in this independent category would prevent a convening authority or staff judge advocate from showing his displeasure with the judicial performance of a military judge by unfairly downgrading him on the performance of his other, nonjudicial, duties.

Appellate military judges, as well as all military judges of general courts-martial, are required by the Code to be completely independent of command channels. They are responsible only to The Judge Advocate General or his designee.¹⁴⁰

Appellate military judges and military judges assigned to the independent trial judiciary are about as independent as it is possible to make judges within the military structure. Obviously they are not as independent as a federal judge who has life tenure, but they are at least as independent as the many state court judges who are elected to office.¹⁴¹

137. *Id.* art. 26, 10 U.S.C. § 826 (Supp. V, 1970).

138. *Id.* art. 26(c), 10 U.S.C. § 826(c) (Supp. V, 1970).

139. In fiscal year 1969, there were 55,597 special courts-martial in the Army, 16,239 in the Navy, and 1733 in the Air Force. REPORT, *supra* note 134.

140. UCMJ art. 66, 10 U.S.C. § 866 (Supp. V, 1970).

141. The selection, training, and experience of military judges varies from one service to another, but the Army is illustrative. All military judges of general courts-martial and appellate military judges are officers serving in the grades of lieutenant colonel and

CRITICISM

The most frequently heard criticisms of the military justice system are directed at the role of the military commander in the military justice process. These criticisms may be included under the heading of "unlawful command influence." Article 37 of the Uniform Code, which was amended by the Military Justice Act of 1968,¹⁴² recognizes the potential problem of influence by the commander in an unlawful manner and specifically prohibits it. Violation of this article could subject an individual to prosecution.¹⁴³ The Court of Military Appeals has been quick, however, to invoke Article 37 to modify the result in a case where even the appearance of unlawful influence was present.¹⁴⁴

Under military practice, the convening authority, the military commander who convenes the court-martial, makes the ultimate decision whether or not an individual will be prosecuted and by what type of court-martial. This function is generally performed in civilian systems by a prosecuting or district attorney, although in federal practice a grand jury indictment will generally be required.¹⁴⁵ In his recently introduced bill,¹⁴⁶ Senator Bayh has proposed that this function be transferred to a legal officer outside the chain of command. The current practice appears sufficiently circumscribed by the Uniform Code of Military Justice and the Manual for Courts-Martial to make the proposed change unnecessary. The convening authority may not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense and is warranted by evidence indicated in the report of investigation,¹⁴⁷ and the convening authority must make similar findings be-

colonel. They have all had extensive experience in the field of military justice including service as counsel of courts-martial and in many cases as staff judge advocates of general court-martial jurisdictions. All military judges certified by The Judge Advocate General of the Army must attend a three-week course for military judges given at The Judge Advocate General's School, Charlottesville, Virginia. Military judge seminars, frequently of a combined service type, are held regularly. Military judges of special courts-martial are majors and senior captains with extensive trial experience. They receive the same training and attend the same seminars as military judges of general courts-martial. A military career pattern starting with assignment as counsel at courts-martial and progressing through assignments as a special court-martial military judge, general court-martial military judge and appellate military judge should develop military judges who have the training and experience required to perform their most difficult jobs.

142. UCMJ art. 37, 10 U.S.C. § 837 (Supp. V, 1970).

143. See *id.* art. 98, 10 U.S.C. § 898 (1964).

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

145. U.S. CONST. amend. V.

146. S. 4191, 91st Cong., 2d Sess. (1970).

147. UCMJ art. 34, 10 U.S.C. § 834 (1964).

fore referring charges to a summary or special court-martial.¹⁴⁸ If a convening authority has other than an official interest in the case, as when he swears to charges, he is precluded from referring a case to trial.¹⁴⁹ When a convening authority refers a case to trial, it indicates no more than that the convening authority believes the charges to be serious and that there is evidence indicating that the guilt or innocence of the accused should be determined by court-martial. The convening authority's power in this area gives him the authority not to prosecute an individual if he determines that this course of action would best serve the public interest.

In the military, the court-members (jury) are not selected at random. The convening authority selects them from the members of his command.¹⁵⁰ An enlisted accused may, upon request, have at least one-third of the court-members also be enlisted men.¹⁵¹ Selection of court-members by other than random process is required to enable the commander to be assured that members of his command needed for military duties will not be unavailable because of court duty. Because the members of courts-martial are selected by the individual who determines that prosecution is warranted, the assertion that members prone to convict will be chosen by the commander has some plausibility; but it does not stand up under scrutiny or in practice. The record is clear that the results of such acts would bring on inexorable consequences. The Code contains a number of provisions designed to protect the accused from getting a stacked court panel. Peremptory challenges are limited,¹⁵² but the accused has an unlimited number of challenges for cause,¹⁵³ and the defense counsel has access to background information on court-members and conducts the *voir dire* examination himself. The most telling argument against the assertion that court-members are selected to convict is

148. MCM ¶ 33.

149. See UCMJ art. 1(9), 10 U.S.C. § 801(9) (1964); MCM ¶ 5a(3). Thus, a convening authority may not convene a court-martial when he is the person actually making the accusation in the case or when he directs someone else to make the accusation. In this case, only a superior authority may convene the court for the trial of the case. MCM ¶ 5a(3).

150. Members of a court-martial are not always members of the command of the convening authority. The Navy, for example, has established law centers throughout the world as a means of furnishing legal services, including the administration of justice, for prescribed geographical areas. These areas are not always the same as command areas of responsibility so the court-martial members may not be from the command of the convening authority.

151. UCMJ art. 25(c), 10 U.S.C. § 825(c) (Supp. V, 1970).

152. *Id.* art. 41(b), 10 U.S.C. § 841(b) (Supp. V, 1970).

153. *Id.* art. 41(a), 10 U.S.C. § 841(a) (Supp. V, 1970).

the number of acquittals which result in the military. The table below compares convictions by general court-martial in the Army with federal court convictions.

COMPARISON OF CONVICTION RATES BY
GENERAL COURTS-MARTIAL AND IN FEDERAL COURTS

The following are the figures and rates for Fiscal Year 1969 and Fiscal Year 1970 for General Courts-Martial in the Army:¹⁵⁴

| <i>FY 1969</i> | | <i>FY 1970</i> | |
|---------------------------------|------|---------------------------------|------|
| Tried | 2482 | Tried | 2628 |
| Convicted | 2323 | Convicted | 2449 |
| Acquitted | 159 | Acquitted | 179 |
| Guilty Plea | 1659 | Guilty Plea | 1853 |
| Overall Conviction Rate: | 94% | Overall Conviction Rate: | 93% |
| Contested Case Conviction Rate: | 82% | Contested Case Conviction Rate: | 77% |

The following are the FY 1969 figures and rates for the United States District Courts:¹⁵⁵

| | |
|---------------------------------|--------|
| Cases Tried | 27,929 |
| Convicted | 26,803 |
| Acquitted | 1,126 |
| Guilty Plea or Nolo | 23,138 |
| Contested Cases | 4,791 |
| Overall Conviction Rate: | 96% |
| Contested Case Conviction Rate: | 77% |

Command influence is also asserted because the convening authority reviews the case after completion of the trial. It is true that the commander reviews the case, but his review may work only to the advantage, and not to the disadvantage, of the accused.¹⁵⁶

154. Figures obtained from the Office of The Judge Advocate General of the Army.

155. ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table D4 (1969).

156. MCM ¶ 88. The strong policy against any attempts to exert command influence on the military justice process is best expressed in a quotation from a speech given at the 1970 American Bar Association Convention in St. Louis on August 11 by General William C. Westmoreland, Army Chief of Staff:

I do not mean to imply that justice should be meted out by the commander who refers a case to trial or by anyone not duly constituted to fulfill a

REFORM

The obvious tenor of this article has been to indicate that the author believes the system of military justice as presently constituted provides procedures and protections compatible in most respects with the standards formulated by the American Bar Association and which equal or surpass the civilian systems of criminal justice in the United States. There are, however, areas in need of reform which deserve discussion.

Selection of court-martial members by the convening authority, while not abused, has been subjected to so much criticism that implementation of a random selection system should be considered. Such a system should include a provision, similar to that presently contained in Article 25, that no accused be tried by any person junior to him in rank or grade without his consent, and the convening authority should have complete discretion to strike from the randomly selected court-panel those persons essential for a military mission.

Under current law, the convening authority is required to review the findings, as well as the sentence, of a court-martial to determine that they are correct in law and fact.¹⁵⁷ The provision regarding sentence review permits the commander to exercise clemency in favor of the accused. This provision should be retained to expedite return to duty of a rehabilitated accused and to permit the other benefits of clemency action to be achieved. The commander's review of findings is in addition to the legal review provided by a trained lawyer.¹⁵⁸ It is a time consuming procedure which the convening authority cannot adequately perform since he generally is not a lawyer. This procedure could well be removed from military practice.

Under the Code as presently written, the convening authority is also required to perform certain other functions which are strictly legal in nature.¹⁵⁹ Under Article 62, if a military judge dismisses a specification before a court-martial on motion, and the ruling does not amount to a finding of not guilty, the convening authority may review the decision and may order the court to reconsider the decision.¹⁶⁰ Military law should be amended to provide a proper judicial procedure for reviewing interlocutory rulings of the trial judge which effectively termi-

judicial role. A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function it will promote discipline.

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

158. See notes 107, 113 *supra* and accompanying text.

159. UCMJ art. 63, 10 U.S.C. § 863 (1964).

160. *Id.* art. 62(a), 10 U.S.C. § 862(a) (1964); MCM ¶ 67f.

nate the prosecution but do not amount to a finding of not guilty. Under federal law, if a district judge dismisses a charge, the United States Attorney may petition the circuit court for a review of this decision.¹⁶¹

Appellate review of courts-martial presents another area in need of reform. Under current law, decisions of the United States Court of Military Appeals may not be reviewed directly by the United States Supreme Court. The accused must start his appellate procedure anew in the federal district court. The government, too, is precluded from seeking further review of an adverse decision of the Court of Military Appeals. The procedure is time consuming and wasteful. When a significant decision such as *O'Callahan v. Parker*¹⁶² is decided by the Supreme Court, it may be a number of years before questions left unanswered by the decision are finally resolved.¹⁶³ Congress should enact legislation to permit the Supreme Court, in its discretion, to review the decisions of the Court of Military Appeals when they involve the question of the jurisdiction of a court-martial over the offense or the offender.

Certain constitutional questions would be presented by such legislation. Article III, section 2, clause 2, of the Constitution defines the jurisdiction of the Supreme Court, and divides it between original and appellate jurisdiction. The original jurisdiction of the Supreme Court can neither be enlarged nor restricted.¹⁶⁴ The appellate jurisdiction of the Court is subject to the control of Congress,¹⁶⁵ but congressional power is not absolute in this regard. Article III, section 2, clause 1, provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . to Controversies to which the United States shall be a party" Review by the Supreme Court outside the original jurisdiction must be on appeal, and the decision to be reviewed must have involved a proceeding which was judicial in nature and admits of a final judgment.

161. 18 U.S.C. § 3731 (Supp. IV, 1968). For appropriate guidelines, see ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 33, 34 (Standard 1.4) (Tentative Draft 1968).

162. 395 U.S. 258 (1969).

163. See, e.g., *Relford v. Commandant*, 39 U.S.L.W. 4240 (U.S. Feb. 24, 1971), which answered the question of whether the decision in *O'Callahan v. Parker* applies retroactively and on a military installation. The Court's ruling appeared to strictly limit the applicability of *O'Callahan*.

164. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).

165. U.S. CONST. art. III, § 2.

It is not important whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law By cases or controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. . . . The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.¹⁶⁶

The Court of Military Appeals is a court created under the provisions of Article I rather than Article III of the Constitution.¹⁶⁷ The Court of Claims and the Court of Customs and Patent Appeals which are now Article III courts were originally Article I courts, and their decisions were reviewable on appeal by the Supreme Court.¹⁶⁸ At the present time, there are no Article I courts whose decisions are directly reviewable by the Supreme Court. Decisions of the Tax Court are reviewed by Circuit Courts and then may be reviewed by the Supreme Court.¹⁶⁹ The same process is used to review the decisions of many administrative agencies.¹⁷⁰ The reason for this two-step process is interesting. Since the decisions of administrative agencies may not be final and may involve administrative proceedings, they do not come within the judicial power of the United States and hence cannot be reviewed on appeal by the Supreme Court. Review of these decisions by the lower federal courts is limited by statute to questions of law, with findings of fact to be upheld if supported by substantial evidence—a legal question. By this process, the proceedings before the lower court become judicial and may ultimately be reviewed by the Supreme Court.¹⁷¹ This same process has been suggested for review of Court of Military Appeals decisions by the Supreme Court although no explanation is given as to why it is necessary.¹⁷²

The two-step process does not seem necessary. Decisions of the Court

166. *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 722, 723, 724 (1929).

167. UCMJ art. 67(a)(1), 10 U.S.C. § 867(a)(1) (Supp. IV, 1968).

168. *DeGroot v. United States*, 72 U.S. (5 Wall.) 419 (1866).

169. 26 U.S.C. § 7483 (1964).

170. See, K. DAVIS, *ADMINISTRATIVE LAW* 442 (1965).

171. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 43 (1963).

172. Keefe, *Reactions to Current Legal Literature*, 56 A.B.A.J. 188, 193 (1970).

of Military Appeals are final and judicial in nature. In *Noyd v. Bond*,¹⁷³ the Supreme Court indicated at least a notion that it could be given jurisdiction to review decisions of the Court of Military Appeals. "It is for these reasons that Congress, in the exercise of its power to 'Make Rules for the Government and Regulation of the land and naval forces' has never given this court appellate jurisdiction to supervise the administration of criminal justice in the Military."

Two provisions of the Uniform Code of Military Justice may cloud the finality of the Court of Military Appeals decisions. Article 71(a)¹⁷⁴ requires approval by the President of death sentences and sentences involving general or flag officers. Article 71(b)¹⁷⁵ requires approval of the service Secretary for sentences extending to dismissal of officers. These sentences are, therefore, not absolutely final when approved by the Court of Military Appeals. However, since the President and Secretaries have no power to affect the findings of the court-martial, their actions are much more akin to the clemency powers of the President in federal cases and state governors in state cases.

CONCLUSION

There is a high order of justice in our military system of justice. Professional military leaders and their lawyers who constitute the Judge Advocate General's Corps' of the services have not been content to maintain the status quo. They have been in the forefront of progress in developing a legal system designed to meet the exigencies of the time. The present high quality of military justice has evolved from the crucible of extended experience.

That experience clearly documents the need for a special system designed to meet the specialized problems of the military, functioning within the military establishment, and moving progressively to a status of independence. But, in the development of that system, the military leaders themselves have sought to bring military justice within the ambit of civilian justice. In fact, they have been in the vanguard, implementing the more enlightened views of the bench and bar. One needs only to study the Manual for Courts-Martial and the Uniform Code of Military Justice to conclude that most of the applicable principles of the American Bar Association's Standards for Criminal Justice are now a reality in the unified system of military justice.

173. 395 U.S. 683, 694 (1969).

174. UCMJ art. 71(a), 10 U.S.C. § 871(a) (1964).

175. *Id.* art. 71(b), 10 U.S.C. § 871(b) (1964).

Beyond that, the professionalization of the military legal services has been rising steadily despite many adverse circumstances and a growing work load that is closely akin to the burdens brought on by sheer volume in our fifty states, the District of Columbia, and the federal system. In fact, the concept of continuing legal education by military lawyers is a greater reality than in the civilian bar.

To be sure, the military system is not perfect—no system can be perfect as long as it is operated by human beings. What is important is to provide safeguards against human error, and it is clear that military leaders and lawyers have a high degree of motivation in this area. If the past is any criterion for the future, then we may expect to witness continued improvement of our system of military justice.