

# THE ADVOCATE

## A Monthly Newsletter for Military Defense Counsel

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The views expressed in THE ADVOCATE are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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### EXTRAORDINARY REMEDIES

Let us suppose that your client is in pretrial confinement. Charges have just been preferred, but you know that because of the complexity of the case, it will be a long time to trial. Let us further suppose that while in confinement, he is being commingled with sentenced prisoners, and is thereby being punished in violation of Article 13, Uniform Code of Military Justice. Such punishment is a denial of military due process, United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969). What can you do about it now, well in advance of trial?

Clearly one of the most desirable, and probably the most immediately effective remedy would be a court order against the stockade commander, restraining him from so punishing your client. See Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968). This court order would be in the nature of an extraordinary, that is extra-court-martial, remedy. It has long been thought that there is no such procedure in the military, primarily because the only military officer with a quasi-judicial function was the law officer, and he could not act at all at least until appointed immediately before trial, and probably not until the court-martial was actually convened.

All of this may have changed after 1 August 1969. As of that date, law officers became military judges. Does a military judge have the power to grant extraordinary remedies? We simply do not know.

The revised edition of the 1969 Manual as well as the amendment to Article 26 of the Code make it clear that the primary duty of a military judge is to act as judge at a special or general court-martial. However, both point out that the military judge may perform other judicial functions when "such duties are assigned to him by or with the approval of [The] Judge Advocate General or his designee." It could persuasively be argued that this section grants The Judge Advocate General the power to authorize the exercise of extraordinary powers in military judges.

It is clear under the Code that the military judge could determine an issue such as the violation of Article 13 anytime after the service of charges which have been referred to trial simply by calling the court into session without the presence of the members under Article 39(a). Presumably his powers at that time are not limited and extend even to dismissing the charges for denial of due process.

If there is any difference, beside the obvious semantic one, between a "law officer" and a "military judge", then one real distinction may be in the area of the powers of the judge qua judge. The Court of Military Appeals has long recommended that law officers be regarded as the equivalent of federal district judges. It is, of course, too early to tell whether the change of title will tend to have this effect, but the trend toward the independent military judiciary certainly indicates that it might. It is also significant that the military judge is now required only to take the oath of office once, rather than before each trial, indicating that he may have a judicial function and indeed judicial power other than simply presiding over courts-martial. Conceivably, the military judge could now be called upon to issue search and arrest warrants, as well as well as other extraordinary remedies in aid of his jurisdiction.

The extraordinary powers of the Court of Military Review have received some scrutiny before the name was changed, but the question was never finally resolved. In Noyd v. Bond, U.S. (16 June 1969), the petitioner sought a writ of habeas corpus in the federal court before his military remedies were exhausted, contending that his confinement was an attempt to "execute" his sentence.

The government responded that since Noyd had not yet exhausted his military remedies, his petition was premature. The Court agreed. The government also argued that Noyd should have applied to the board of review for extraordinary relief. The Court, in a footnote, responded that the government could cite no case where the boards have asserted such a power, nor any statute which unequivocally grants the authority. "In the absence of any attempt by the Boards of Review to assert such a power, we do not believe that petitioner may properly be required to exhaust a remedy which may not exist." Noyd, supra fn.11.

Does the remedy exist now? Again, we do not know. At least one Army judge was of the opinion that the board of review had the power to "grant extraordinary relief to insure the avoidance of a manifest miscarriage of justice." CMR 419231 Smith, (unpublished, 14 February 1969) (Hagopian, J., concurring). See also NCM68 3526, McNair, (10 June 1969). Presumably this power, if it existed at all, carried over the new Court of Military Review. Whether the power is ever exercised will, however, depend on whether, in the words of the Supreme Court, the Courts of Military Review "attempt . . . to assert such a power."

It is now well settled that the United States Court of Military Appeals does have the power to issue all extraordinary writs comprehended by the All Writs Act. It was at one time fashionable to argue that the court was not a Court of the United States because its judges did not have life tenure, and consequently could not issue writs. This has now been laid to rest with a recent amendment to Article 67(a)(1) of the Code making it clear that the Court of Military Appeals is "established under Article 1 of the Constitution of United States." The Court is, however, reluctant to use its extraordinary powers. It has never granted a writ of habeas corpus, and only on a few occasions has it granted a writ of error coram nobis. Most of its extraordinary relief is entitled "appropriate relief". See, e.g., Jones v. Ignatius, 18 USCMA 7, 39 CMR 7 (1968). [One reason the Court may be reluctant to grant habeas corpus is that under federal law., if any question of fact exists, an evidentiary hearing must be held by the judge granting the writ before the writ is discharged.]

What does all this mean for the trial defense counsel? First, it means that a defense counsel in the field who is

presented with a situation which in civilian practice would call for the exercise of extraordinary relief may not be wholly without remedy in the military system itself. Counsel should definitely explore the possibility that military judges may have extraordinary powers, and hence problems may be solved at the local level. Whether an appeal from the denial of such relief at the local level could be taken to the new U. S. Court of Military Review will depend largely upon whether the Court assumes extraordinary power. If it holds that it has no power to review anything but a completed court-martial, then counsel's only recourse would be to the Court of Military Appeals where such extraordinary power definitely exists.

This raises, of course, the collateral question whether the trial defense counsel is authorized to pursue such extraordinary avenues in the military system. This too, has not been satisfactorily answered, but we know of no reason why a trial defense counsel, properly admitted to practice before either the Court of Military Review, or the Court of Military Appeals could not ask for extraordinary relief incident to his duties as trial defense counsel, and which relief would be called for by the situation at hand. If the courts do indeed have such power, it is meaningful only if it can be exercised; to preclude trial defense counsel from pursuing extraordinary remedies would be to render them illusory indeed. We welcome comments from military lawyers and judges alike.

#### ADVISING YOUR CLIENT ABOUT THE DISCIPLINARY BARRACKS

[Editor's note: The following article is the fourth in a series concerning post-trial duties of the trial defense counsel and appellate proceedings in the Army. See Post-Trial Duties of the Defense Counsel, THE ADVOCATE 1:1, Appeal and Review of Special and Summary Court-Martial Convictions, THE ADVOCATE, 1:4, Appellate Procedure in the Army, THE ADVOCATE, 1:5. It was submitted by the Staff Judge Advocate, Headquarters, Fort Leavenworth, Kansas.]

A man who is facing a period of confinement at the United States Disciplinary Barracks often has many questions. Since his trial defense counsel is the most logical person to answer these questions, it is important that the defense counsel be able to advise his client regarding his impending period of confinement.

## General Provisions for all Prisoners

A convicted serviceman's sentence begins the day it is adjudged by the court-martial. In computing the actual release date however, 6 days per month or 72 days a year are subtracted, and is credited as "good conduct time." This time is earned by all prisoners and is only lost in cases where disciplinary action is taken. In addition, a prisoner may earn abatement or "extra good conduct time: at his assigned job. For a semi-skilled job he can earn 2 days a month, and in a skilled job he can earn 3 days a month. Based on a man's adjudged sentence, a maximum release date is computed, and then taking into consideration his good conduct time and extra good conduct time, his minimum release date is calculated. The latter, of course, must be revised periodically depending on the man's performance. The various jobs to which a man may be assigned shortly after his arrival at the Disciplinary Barracks are too numerous to mention; a man usually may obtain a transfer to another job if he so desires.

The Disciplinary Barracks also conducts an extensive voluntary educative program. A man may earn his high school GED or take college level courses through an arrangement with a local junior college. Recently a computer programming course was added.

From time to time various boards review each prisoner's record. They consider such things as his work reports, any delinquency reports and statements by his detail counselor. One such board is the Disposition Board, which has authority to recommend clemency, or restoration to duty to the Secretary of the Army. The Secretary has the authority to reduce a sentence or remit the unexecuted portion of that sentence. The Commandant of the Disciplinary Barracks has authority to remit the sentence of a special court-martial but he is powerless to remit any portion of a general court sentence.

Time spent in confinement serving an adjudged sentence does not count toward a man's unserved military obligation. When a man is released from the Disciplinary Barracks, he receives a free trip home, a suit of clothes made at the Tailor Shop and up to \$25.00 cash.

### Prisoners Without a Punitive Discharge

When a man arrives at the Disciplinary Barracks without a punitive discharge, he is seen by a Restoration and Screening Board within 30 to 60 days. The function of this board is to decide whether the man should be recommended for an administrative discharge pursuant to AR 635-212 or return to active duty. This board considers evidence from almost any source including letters of recommendation, civilian criminal record, and the results of a routine psychiatric examination. If it is determined that a man should be returned to duty, he eventually will be sent to Fort Riley, Kansas, for the Correctional Training Facility (CTF) program. Normally a prisoner who is returning to duty is sent to the CTF when he has from 70 days to one year remaining on his sentence. The CTF training program is very similar to basic combat training.

### Prisoners With a Punitive Discharge

A prisoner with a punitive discharge, of course, cannot be returned to active duty unless such restoration is recommended by a Disposition Board and approved by the Secretary of the Army. If he has a sentence of at least a year and a day, however, he is eligible for parole. Normally a Disposition Board will consider recommending parole, clemency or restoration. Clemency must be granted, if at all, by the Secretary of the Army, and as a practical matter very few prisoners are successful in this respect.

The odds are better, however, with regard to a man's chances for parole. After a discharge-type prisoner has served at least one-third of his sentence (keeping in mind that it must be a sentence of at least a year and a day), he is eligible for parole. This matter is considered by a Disposition Board at the Disciplinary Board at the Disciplinary Barracks which requires among other things, that the man have a place to live and gainful employment when he is paroled. Approximately 20% of the parole cases are granted by the Secretary of the Army. One can be considered for parole more than once. There is a local parolee unit sponsored by the Disciplinary Barracks, participants of which live outside the walls.

O'CALLAHAN V. PARKER: ROUND THREE

Although at the time of publication we have not yet heard from the Court of Military Appeals on O'Callahan, the boards of review have already discussed jurisdiction in a variety of circumstances. To date, every offense discussed by the boards has been found to be service-connected, but the rationales continue to be diverse.

For example, one judge holds that the wartime-peace-time distinction controls and thus O'Callahan has no present viability. In CM 419489, Elwood, (15 July 1969), the Board held that possession of LSD, Eskatrol and Dexamyl both on-post and off-post were service-connected. In CM 420522, Williams, (23 July 1969), and on-post assault against a military victim was service-connected, as was an on-post murder of a soldier in CM 420028, Hurt, (11 July 1969). One judge concurred in both because both were tried under the war powers.

An off-post assault against a superior NCO attempting to persuade the offender to return to duty was service-connected in CM 419911, Clifford A. Bell, (9 July 1969).

In CM 419988, Victor M. Bell, (3 July 1969), the board held that uttering statements with intent to promote disloyalty among the troops on-post was service-connected. The offense is triable in a federal district court under 18 USC §2387-88 (1964), to be sure, but in the military it is charged as violation of Article 134. One of the elements of that offense is prejudice to good order and discipline. Thus, the specification is declaratory of a purely military offense. [Presumably, then, most Article 134 offenses are service-connected.] The board went further, however, and opined that if the case "arises in the land and naval forces", the accused is not entitled to the protections of a grand jury and petit jury, and in that case O'Callahan would not divest the military of jurisdiction. Thus, the test seems not to be service connection, but whether the case arose in the land of naval forces. Finally the board ruled that "absent a pronouncement from a higher judicial authority, "O'Callahan is assumed to be retroactive.

In CM 420194, Guntner, (11 July 1969), the board held that a military victim of an off-post robbery renders the offense

service-connected, and in CM 420337, Mueller, (24 July 1969), an off-post sale of marihuana to an undercover CID agent was service-connected. There the board noted in a footnote that we are now at war in Vietnam, but declined to bottom its decisions on that fact.

Finally, in CM 420264, Vipond, (23 July 1969), the accused stole a credit card from a fellow soldier and forged his name to gasoline invoices, off-post. The larceny was held service-connected because the owner of the property was a soldier. The forgery was also service-connected, although not for the same reason. The forgery was committed off-post at a commercial facility, and defrauded the gasoline company. Nevertheless, the board held that since the documents operated to the legal prejudice of a member of the armed forces, the offense was service-connected.

#### THE MILITARY MAGISTRATE--COMMANDING OFFICER OR MILITARY JUDGE?

The traditional view of the commanding officer as a person empowered to authorize and conduct searches, Paragraph 152, Manual for Courts-Martial, United States, 1969, Revised Edition; United States v. Hartsook, 15 USCMA 291, 35 CMR 263 (1965), seems constitutionally questionable. The procedure of antecedent justification for a search before a magistrate has been categorized as "central to the Fourth Amendment." Ohio ex rel. Eaton v. Price, 364 U.S. 263, 272 (1960); see also Osborn v. United States, 385 U.S. 323 (1966). The goal is to assure that such justification be found by a "neutral and detached" magistrate. Johnson v. United States, 333 U.S. 10, 14 (1948); see also Spinelli v. United States, 393 U.S. 410, 415 (1969).

Whether a commanding officer in pursuit of criminal activity satisfies the constitutional criterion is highly questionable. Since 1 August 1969, most commands have military judges readily accessible who may be proper persons to authorize searches based upon probable cause. Especially is this so in view of the fact that one of the purposes of the Military Justice Act of 1968 was "to redescribe the law officer of a court-martial as a 'military judge' and give him functions and powers more closely allied to those of a Federal district judge . . ." S. Rep. No. 1601, 90th Cong., 2d Sess. 3 (1968).

We encourage defense counsel to explore this method of insuring that their clients' rights have been fully protected.

HOW TO IMPEACH A WITNESS WITH A PRIOR INCONSISTENT STATEMENT

1. Private Smith, you stated on direct examination that \_\_\_\_\_ did you not?
2. Have you ever given a different version of that incident?
3. You did talk to Agent Jones of the CID, did you not?
4. That was on 2 June 1969, was it not?
5. And Agent White was also present, was he not?
6. And they wrote down what you said, did they not?
7. And the you read what they wrote and signed it in their presence, didn't you?
8. Was that statement accurate?
9. That statement was a reliable statement of what you observed concerning this case, wasn't it?
10. That statement was made with the facts of the case fresher in your mind than they are today, wasn't it?

[Here have statement marked as defense exhibit for identification]

11. I show you Defense Exhibit A for identification and ask you if that is your signature?
12. That is the document you read and signed, isn't it?
13. Directing your attention to line 10, you stated at that time that [contradiction] did you not?
14. That is directly contrary to what you are now saying, is it not?
15. Then your testimony on direct examination was not entirely accurate, was it?
16. Your memory is not so blurred that you can't remember any longer whether [fact forming basis of contradiction].

CAVEAT: It is important for counsel, in order to achieve the maximum impact from this line of questioning, to insure that

the witness answers only the precise questions asked. Do not let the witness ramble in his explanation of the discrepancy. Let him explain it further on redirect, if he desires. See generally Maryland, District of Columbia, Virginia, Criminal Practice Institute, Trial Manual (1964).

#### OBJECTING TO FINAL ARGUMENTS

The Court of Military Appeals recently discussed prejudicial final prosecution arguments, and noted that the lack of prejudice in the case at bar was reinforced by the failure of the defense counsel to object. United States v. Wood, 18 USCMA 291, 40 CMR 3 (1969). See NCM 69 1066, Coffey, (13 June 1969). In order to avoid waiver, we recommend that objection be noted for the record whenever there is a fair risk that the government's final argument may have been inflammatory or prejudicial. This objection need not interrupt the argument, nor need it be made in open court. It may be made at a side-bar conference following the argument.

#### RECENT DECISIONS OF INTEREST TO DEFENSE COUNSEL

**JURISDICTION OVER CIVILIANS** -- Since O'Callahan teaches that military jurisdiction should be restricted to its "proper domain" and is one that "rests on the special needs of the military", there is no court-martial jurisdiction over a civilian seaman ashore in a Vietnam port for a short time. Latney v. Ignatius, \_\_\_ F.2d \_\_\_ (D.C. Cir. 30 June 1969).

**COMMENTING ON ACCUSED'S FAILURE TO TESTIFY** -- It is improper for the prosecutor to observe, during his final argument, that the only evidence to come before the court was the government's evidence. Goitia v. United States, 409 F.2d 524 (1969).

**ALLEN CHARGE DISAPPROVED** -- The Third Circuit has ruled that the Allen charge (Allen v. United States, 164 U.S. 492 (1896)) is so prejudicial that it may no longer be given to a "hung jury" in order to break a deadlock. United States v. Ficravaniti, \_\_\_ F.2d \_\_\_ (3d Cir. 16 July 1969).

"TIME OF WAR" TOLL OF LIMITATIONS STRICTLY CONSTRUED -- The "time of war" lifting of the statute of limitations applies only to the specific offenses spelled out in Article 43(a) of the Code. NCM 69 1434, Hughes, (10 June 1969).

EXTENUATION AND MITIGATION -- It is prejudicial error for the trial defense counsel to fail to note for the court that the accused was a rifle marksman, served in Vietnam and was authorized to wear certain medals. Sentence reassessed. NCM 69 1032, Bradshaw, (4 June 1969).

POST-TRIAL INTERVIEW -- COUNSEL -- There is no right to counsel at the post-trial interview as long as the interview is not used as a "crutch upon which to support a sentence which is inappropriately severe or to accomplish any other chore for the prosecution." NCM 69 1284, Gibson, (3 June 1969).

WARNING REQUIRED BEFORE REQUEST FOR ID CARD -- Since the MP recognized the accused, and since he thus knew that the accused was wearing false name tag, MP was required to preface request for ID card with Miranda warning. CM 419824, Rodriguez, (3 July 1969).



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