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Bulletin No. 44

July, 1972

The Judge Advocate JOURNAL



Published By

JUDGE ADVOCATES ASSOCIATION

An affiliated organization of the American Bar Association, composed
of lawyers of all components of the Army, Navy, and Air Force

Denrike Building

Washington, D. C. 20005

JUDGE ADVOCATE JOURNAL

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Publication Notice

The views expressed in articles printed herein are not to be regarded as those of the Judge Advocates Association or its officers and directors or of the editor unless expressly so stated.

TABLE OF CONTENTS

	PAGE
Remarks of the Judge Advocate General	1
1972 Annual Meeting—San Francisco	5
Staring Named TJAG—Navy	7
Viet Nam Hustings	8
In Memoriam	49
Prugh Becomes TJAG—Army	51
State Military Legislation	52
Law Day at the Pentagon	79
What the Members are Doing	84

Officers and Directors 1971-72—see inside back cover.

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REMARKS OF THE JUDGE ADVOCATE GENERAL OF THE FORCES AT LONDON MEETING

B.A.C. Duncan, Esquire, C.B.E., Judge Advocate General of the Forces addressed the members of the Judge Advocates Association and their ladies and guests at Armoury House, London on 16 July 1971 on the occasion of the Association's Annual Meeting and Banquet as follows:

I should like to open by saying how much I have appreciated the opportunity which I have been given tonight to meet you and to receive your most generous hospitality. I feel that I have been most fortunate in holding the appointment of Judge Advocate General in this country at a time when you have selected London for the purpose of your Conference.

Last Summer I received visits in London from the Judge Advocate General of Canada and from the Judge Advocate General of New Zealand, and with your visit this year it has brought home to me, with considerable force, the large areas of the world over which we operate and yet how closely connected our various organizations remain. Naturally, we develop in different ways to meet our particular requirements, but basically the principles upon which we work remain the same and many of the problems which we have to solve are similar.

As on this occasion your Conference is being held in London, where I believe the appointment of Judge Advocate General was first created, I feel that it might be appropriate to take up a little of your time by dealing briefly with the history of the appointment in this country.

The first Judge Advocate General was appointed by King Charles II in 1666, five years after he had created the appointment of Judge Advocate of the Fleet. During the three hundred years in which it has been in existence, the appointment has always been held by a civilian. I have in my office a list, which I believe to be complete, of the holders of the appointment, together with a collection of prints, sketches and plates of practically all my predecessors during the last one hundred and fifty years.

The duties of the Judge Advocate General have naturally varied over the years, and during practically the whole of the nineteenth century it was customary to appoint a lawyer who was also a Member of Parliament, and who was therefore available to assist the Government by replying to questions and dealing with matters affecting the Army when they were raised in debate in the House of Commons. This meant, however, that when the Government fell, the Judge Advocate General, like the

Attorney-General and the Solicitor General, resigned with them. Fortunately, at the end of the century this practice was discontinued, and the Judge Advocate General ceased to have any political duties or connections.

With the formation of the Royal Air Force in 1918 the Judge Advocate General's duties were extended to include the new Service.

Up to 1948, a number of legally qualified Army and Royal Air Force officers were attached to the Judge Advocate General's Office, their duties being to draft charges and to act as prosecutors at trials by courts-martial in this country, and to fill the appointments of overseas establishments, where they acted both as prosecutors or judge advocates as required. It was then decided that it was undesirable for the judge advocates and the prosecutors to work in the same office, and separate legal departments were set up for both the Army and Royal Air Force, manned by serving officers who were legally qualified and whose duties it was to advise on pre-trial matters, formulate charges, prosecute at courts-martial, and to provide legal advice for servicemen in their personal affairs, but not to act as defending counsel at courts-martial. Consequently, the Office of the Judge Advocate General became once more entirely civilian, and was limited to providing judge advocates for trials by courts-martial when required, and to dealing with all post-trial matters including petitions and appeals,

but they now carried out these duties both at home and overseas and normally half my staff are stationed abroad at the present time.

In 1951 perhaps the most important event took place, namely the creation of the Courts-Martial Appeal Court, which was composed of at least three civil judges, precisely the same as the Court of Criminal Appeal, and which for the first time gave the serviceman a right of appeal to a civil tribunal against a conviction by courts-martial.

Our present system is to pass a new Act every five years which provides for the continuation in force of the existing Army and Air Force Acts of 1955 and in future the Naval Discipline Act 1957 as well, and this quinquennial Act enables Parliament to review and amend as necessary the Acts governing the Services at regular intervals. The Armed Forces Act 1971 has just received the Royal Assent and will come into force during 1972. Its main objective was to achieve, as far as possible, the integration of the three services, and it does include, for the first time, a disciplinary code of offenses and punishments essentially common to all three Services, and in this respect abolishes the substantial differences which previously existed between the Army and Air Force Acts on the one hand and the Naval Discipline Act on the other. There are still, however, considerable differences in procedure between a naval courts-martial

and one conducted by the Army or Air Force, and the summary powers of the commander of a ship are substantially greater than those of a commanding officer in either of the other Services. It would seem likely that further efforts may be made to achieve uniformity between the services, but this is a matter of policy and not a question for me.

Also, during the last Government, a new pay structure for the services was introduced, the object being to equate the earnings of service personnel with those obtainable in civil employment by persons of equivalent status. Whether the change has been beneficial for the serviceman is rather a matter for conjecture, as the higher rate of pay naturally attracts increased taxation, and the soldier is now required, like his civilian equivalent, to pay for his food, accommodation and to some extent clothing, which previously he received free.

So far as the legal departments are concerned, it has demonstrated that whereas a soldier cannot spend more money than the amount placed in his hand at a pay parade, he can certainly issue cheques in excess of the amount credited to his account in a bank.

Finally, efforts have been made to improve the opportunities for soldiers, and particularly boy entrants, who wish to terminate their engagement, to leave the service if they desire to do so, but this is a matter which has always caused difficulty, and some restrictions

must remain in the interests of the efficiency of the Services.

I trust that I have been able, without wearying you too much, to give you a general outline of the functions of my Office and of the developments in the administration of service law in this country during recent years. In one respect, however, I must disappoint you. I have been asked to refer particularly to the new development in certain countries of the unionisation of troops and the acceptance of bargaining rights. I am afraid that on these questions my knowledge is strictly limited. I understand that in some European countries, such as Sweden, there has been considerable progress in this respect, but I have no experience of it and so far as the United Kingdom is concerned there is no intention on the part of the Government, so far as I am aware, to take any steps in this direction, nor is there apparently any substantial body of opinion in favour of it. We have no conscription or national service in this country at the moment, and our armed forces consist entirely of volunteers. In these circumstances, it would seem doubtful whether there is any real demand for any form of unionisation among the members of the forces themselves.

So far as future legislation in the United Kingdom is concerned, we now anticipate a period of calm while the provisions of the Armed Forces Act 1971 are absorbed, but after two years, if the normal procedure is followed, a Committee will probably be set up to consider

any amendments to the existing Acts which may be required by changing circumstances or by Government policy, and after examination to prepare a Bill incorporating such changes or amendments as

are considered desirable for the approval of the Minister and eventual submission to Parliament in 1976, when the next quinquennial Act must be passed if the armed forces are to continue in existence.



THE 1972 ANNUAL MEETING TO BE IN SAN FRANCISCO

The twenty-ninth Annual Meeting of the Judge Advocates Association will be held in San Francisco on 14 August 1972 coincident with the annual meeting of the American Bar Association there. The Arrangements Committee is Co-chaired by Colonel William L. Shaw and Colonel John H. Finger.

The Annual Meeting will convene at 3:00 P.M. on Monday, 14 August 1972 in the San Francisco Bar Association Lounge, Mills Tower, 220 Bush Street, San Francisco. Reports will be made by Major General George S. Prugh, The Judge Advocate General of the Army, Rear Admiral Merlin H. Staring, The Judge Advocate General of the Navy and Major General James S. Cheney, The Judge Advocate General of the Air Force. The results of the annual election will be announced at this meeting.

The Annual Dinner will be on the same day at the Fleet Admiral Nimitz Club, Treasure Island, with reception and cocktails beginning at 6:30 P.M. and dinner at 8:00 P.M. Dress will be informal. Bus transportation to and from Treasure Island from a downtown San Francisco location is planned. The tariff has been set at \$12.50 per person which includes hot and cold hors d'oeuvres, complete dinner and wine. The bar will be open throughout the evening at regular club prices. Advance reservations should be made as early as possible so that adequate provision can be made for transportation and supplies. Reservation forms will be distributed to the members with the annual election material on or about 10 July, but reservations can be made at any time now by letter to the Executive Secretary at the Association's office in Washington.

The Arrangements Committee expects to have the largest and finest gathering of JAA members and their guests ever assembled in the Association's history of excellent annual dinners and they look forward to personally greeting you in San Francisco.





Rear Admiral Merlin H. Staring

STARING NAMED TJAG — NAVY

Rear Admiral Merlin H. Staring, who served as Deputy Judge Advocate General of the Navy since February, 1971, was named The Judge Advocate General on 1 April, 1972. He succeeds Rear Admiral Joseph B. McDevitt who has retired after thirty years' service.

Admiral Staring is a native of New York. He received his BA degree from Louisiana State University in 1941 where he graduated with honors and had been named outstanding ROTC field artillery cadet. He was commissioned Ensign USNR in May 1941 and did graduate work in physics and electrical engineering prior to reporting for active naval service in December, 1941. During WWII he served at the U. S. Naval Observatory as Material Officer doing navigational instrument work. In 1947 he received the degree of LLB at Georgetown University and was assigned to the General Law Division OJAG. In 1949 he was assigned to the Legal Office of the Fourteenth Naval District and in 1951 to the Legal Office of the Potomac River Naval Command. He obtained a LLM degree at Georgetown in 1952.

From 1953-56 he served in the Administrative Law Division OJAG. He was Assistant Staff Legal Officer from 1957-58 on the Staff of the Commander-in-Chief, Eastern Atlantic and Mediterranean and in June 1958 reported as SLO on the Staff of Commander, Service Force, Sixth Fleet. On promotion to Captain in 1960, he became Fleet Legal Officer of the Pacific Fleet. From 1964-67 he was Director of the Administrative Law Division, OJAG. In 1967-68 he served as Force and Staff Legal Officer, U.S. Naval Forces, Europe and then he was reassigned to Washington as Special Counsel to the Secretary of the Navy where he served until 1971. For his meritorious service in the last assignment, he was awarded the Legion of Merit. In February, 1971 he became Deputy Judge Advocate General with the rank of Rear Admiral.

Admiral Staring is married and has one married daughter. His home town is Clinton, New York. During his current duty, Admiral and Mrs. Staring reside at Bowie, Maryland. Mrs. Staring is also a lawyer.

VIET NAM HUSTINGS

by Dennis R. Hunt *

In this century, each major American military effort, with its masses of draftees subjected to military discipline and courts-martial procedure, has inevitably provoked Congress to *post hoc* revisions of military criminal law.¹ And so the Viet Nam involvement crystalized support for long simmering reforms² and produced the Military Justice Act of 1968.³ That legislation required many changes in military criminal procedure, the most dramatic appearing in special courts-martial—the military “misdemeanor court.” From August 1969, the effective date of the reforms, until July

1970, I presided as judge in Army special courts-martial in Viet Nam, and what follows are my observations concerning the impact of those reforms and the administration of military justice in Viet Nam special courts-martial during those eleven months.

The reforms of the new legislation fit within the basic structure of military criminal process provided in the Act of 5 May 1950⁴ which established the Uniform Code of Military Justice.⁵ There are four strata of military criminal proceedings, and the most serious offenses are tried by general courts-martial composed of a

* Major, JAGC—US Army. U.S. Army Judiciary, Frankfurt, Germany. A member of the bar of the State of Illinois, Major Hunt graduated from Harvard Law School in 1964 and earned his LLM in 1971 at Northwestern Law School.

¹ White, *The Background And The Problem; Military Justice, Its Promise and Performance—The First Decade: 1951-1961*, 35 St. John's L. Rev. 197, 197-201 (1961).

² Ervin, *The Military Justice Act of 1968*, 5 Wake Forest I. L. Rev. 223 (1969); see, *Hearings on Constitutional Rights of Military Personnel Before the Subcom. on Constitutional Rights of the Senate Comm. on the Judiciary pursuant to S. Rep. 260*, 87th Cong., 2d Sess. (1962).

³ 82 Stat. 1335.

⁴ Pub. L. 81-506, ch. 169, § 1, 64 Stat. 108.

⁵ 10 U.S.C. §§ 801-940.

judge and five or more jurors.⁶ The penalties for offenses heard in general court are those provided in the statutes defining the offenses or established by the President,⁷ and include imprisonment, fines, forfeitures of military salary, loss of military grade, punitive discharge from the armed forces, and capital punishment. Special courts-martial include a jury of three⁸ and may try any non-capital offense,⁹ but the penalty adjudged may not exceed confinement at hard labor for six months, reduction to the lowest enlisted grade, and forfeiture of

two-thirds pay per month for six months.¹⁰ A bad conduct discharge may also be returned by the special court, but only if a verbatim record of trial is kept.¹¹ Summary courts-martial are composed of only one officer who serves as judge, jury, prosecution and defense counsel; he need not be legally trained.¹² Similarly limited in jurisdiction to only non-capital offenses, the summary court may not return a sentence in excess of confinement at hard labor for 30 days, forfeiture of two-thirds of one month's military pay, and reduction to the lowest

⁶ 10 U.S.C. § 816(1) (Supp. V 1970). The jury will be composed of officers unless the defendant affirmatively requests enlisted jurors; in the latter event, at least one-third of the jury must be composed of enlisted men. 10 U.S.C. §§ 825(a), (c) (1964), *as amended* (Supp. V 1970).

⁷ 10 U.S.C. § 56 (1964).

⁸ 10 U.S.C. § 816(2) (Supp. V 1970).

⁹ 10 U.S.C. § 819 (Supp. V 1970).

¹⁰ *Id.*

¹¹ *Id.* Prior to 1 August 1969 Army administrative law prohibited the keeping of a verbatim record of trial in special courts-martial and hence excluded the punitive discharge as a sentence in that forum. *Compare*, Dept. of Army Regulation 27-10, para. 5-1a, 26 November 1968, *with*, Dept. of Army Regulation 27-10, change 3, para. 2-21a, 27 May 1969. Both the Navy and Air Force have consistently allowed court reporters and bad conduct discharges in special courts-martial. *See, e.g., United States v. Lucas*, 1 USCMA 19, 1 CMR 19 (1951); *United States v. Black*, 1 CMR 599 (AFBR 1951).

¹² 10 U.S.C. § 816(3) (Supp. V 1970); *Manual For Courts-Martial, United States, 1969 (Revised Edition)*, para. 79. (Hereinafter cited as *MCM 1969 (R)*). The summary court-martial officer's lack of legal qualifications has an analogy in the lack of professional training required for a justice of the peace in several States. *See, e.g., Moats v. Janco*, 8 Cr.L. 2285 (W.Va.Sup.Ct.App., 14 Na. 1971). Uneasy about the practice, the Army encourages the appointment of legally qualified special court-martial judges as summary court-martial officers. Dept. of Army Regulation 27-10, change 3, para. 9-5(b), 27 May 1969.

enlisted grade.¹³ Below this tripartite court system are administrative disciplinary proceedings—the “Article 15, or “Captain’s Mast” in Navy usage—which are imposed by the offender’s commanding officer without an evidentiary hearing.¹⁴ The sanctions possible here depend to some extent upon the grade and command position of the officer imposing punishment, but do not include confinement at hard labor nor the degree of sanctions possible in the summary court martial.¹⁵ The average rate per 1,000 for these various proceedings in the Army during the last quarter of 1970 was: general court-martial, .16; special court-martial, 1.79; summary court-martial .92; Article 15, 16.75.¹⁶

The forum most frequently utilized in Army court-martial proceedings, the special court-martial, was also the focus of the 1968 reforms. Until this legislation, the law did not require that the defendant in special court be provided with a qualified lawyer as his defense counsel; the law’s

provision for appointed defense counsel was found to be satisfied by detailing a legally untrained officer to represent the defendant.¹⁷ However, the 1968 act at last demanded legally qualified, appointed defense counsel:

§ 827. ART. 27. DETAIL OF TRIAL COUNSEL AND DEFENSE COUNSEL (a) For each general and special court-martial the authority convening the court shall detail trial counsel and defense counsel

(c) In the case of a special court-martial—(1) The accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) (for counsel detailed for a general court-martial) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened

¹³ 10 U.S.C. § 820 (Supp. V 1970). In fact, the use of summary courts-martial has substantially declined in the Army in the past decade (*see, Annual Reports of the United States Court of Military Appeals and the Judge Advocate Generals of the Armed Forces and the General Counsel of the Department of Transportation (1961-1969)*), and legislation proposed by Senator Bayh and presently Before Congress would completely abolish the summary court. S. 1127, 92nd Cong., 1st Sess. §§ 16-19 (1971).

¹⁴ 10 U.S.C. § 815 (1964).

¹⁵ *Id.*

¹⁶ 71-6 JALS 6-7 (Dept. of Army Pamphlet 27-71-6).

¹⁷ *United States v. Culp*, 14 USCMA 199, 33 CMR 411 (1963).

and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained; (2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified 10 U.S.C. § 827 (Supp. V 1970).

From the inception of this requirement on 1 August 1969 through the following 30 June, legally qualified defense counsel were waived by the defendant in 7,589 of the total 36,703 Army special courts; in only one case was a qualified defense counsel requested but determined to be unavailable.¹⁸ The second signifi-

cant modification in special and general court procedure wrought by the 1968 act was the bench trial; previously the findings and sentence were the sole responsibility of the military jury.¹⁹ Enormously popular with defendants—at whose sole option the jury might be waived,²⁰ bench trials in the first eleven months of the new program accounted for 2,037 or 84 per cent of the 2,420 Army general courts-martial;²¹ in Army special courts-martial, during the same period, in which a judge was present, the jury was waived in 96 percent of all trials.²²

The final major modification in special court-martial procedure, and my ticket to Viet Nam, was the new provision for judges in special courts:

§ 826. ART. 26. MILITARY
JUDGE OF A GENERAL OR

¹⁸ Statistics supplied by the United States Army Judiciary.

¹⁹ Compare, 10 U.S.C. § 816 (Supp. V 1970) with, Act of 5 May 1950, Pub. L. 81-506, ch. 169, § 1, arts, 16, 51-53, 64 Stat. 108. The present statute appears to exclude the possibility of a jury trial on the merits and sentencing by the judge alone—or vice versa.

²⁰ Unlike Rule 23a, Federal Rules of Criminal Procedure, the military defendant's right to bench trial is not conditioned upon prosecution concurrence (see, S. Rep. No. 1601, 90th Cong., 2d Sess. at 4 (1968)), however, the military prosecutor may argue against the defense motion for bench trial. *MCM 1969 (R)*, para. 53d(2). The right does not exist in a capital case. 10 U.S.C. § 818 (Supp. V 1970). The circumstances under which a motion for bench trial may be denied by the judge have yet to be litigated, but the Army Judiciary has surmised that the right to refuse such a request is extraordinarily limited—if not nonexistent. Military Judge Memorandum No. 47, JAGVA, 13 Aug. 1969, reprinted in 69-21 JALS 18 (Dept. of Army Pamphlet 27-69-21).

²¹ Statistics supplied by the United States Army Judiciary.

²² *Id.*

SPECIAL COURT - MARTIAL

(a) the authority convening a general court-martial shall, and, subject to regulations of the Secretary concerned, the authority convening a special court-martial may, detail a military judge thereto. A military judge shall preside over each open session of the court-martial to which he has been detailed. (b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. . . . 10 U.S.C. § 826 (Supp. V 1970)²³

For the Army, this provision is implemented by two categories of judges who preside in special courts. I belonged to the first category who are assigned to the United States Army Judiciary command in Washington, D.C. and who have no relationship, but for logistic support, with the chain of

command in the local jurisdictions in which they preside.²⁴ The second category of special court judges are those qualified lawyers, also certified as judges, who are assigned to duty in the legal sections of the various local command headquarters.²⁵ These men are responsible through the chain of command for the general performance of their duties to the commanding officers who sometimes convene the courts in which they preside, but the law explicitly excludes judicial functions from those matters subject to the control or influence of the command.²⁶ As for the question of which judge is to preside in any particular case, Army regulations contemplate a rather cumbersome process in which the local command legal advisor will address a request for a special court judge to the regional general court judiciary; the judiciary will seek first to detail a Judiciary special court-martial judge to the case, or, failing that, a qualified judge from one of the local legal offices; failing both these alternatives, the request is to be returned and the command legal ad-

²³ Previously, the judicial function in special courts-martial was fulfilled by the senior ranking juror. *Manual For Courts Martial, United States, 1951*, para. 78 and appendix 8a.

²⁴ Dept. of Army Regulation 27-10, change 3, paras. 9-2d(1), 9-6 and 9-9, 27 May 1969. With few exceptions, this is the same structure of organization which is provided by statute for all general court-martial judges. *See*, 10 U.S.C. § 826(c) (Supp. V 1970).

²⁵ Dept. of Army Regulation 27-10, change 3, para. 9-2d(2), 27 May 1969.

²⁶ 10 U.S.C. § 837 (Supp. V 1970).

visor is at liberty to utilize any qualified judge he can find.²⁷

The realities of Viet Nam in the summer of 1969 necessarily precluded use of this scheme for assigning judges to special courts. Army troop strength was near its peak, and special courts-martial occurred at the rate of 600 per month during the early summer; in the fall that figure declined to 450 per month and remained at approximately that level for the remainder of my term. At the outset of the reforms, only myself and one other Army Judiciary special court judge were stationed in Viet Nam—both at Long Binh, the gargantuan base 15 miles north of Saigon containing, *inter alia*, the United States Army Viet Nam (USARV) Headquarters. At the same time there were 16 Army lawyers qualified as special courts-martial judges, who were working in legal offices from Saigon to the demilitarized zone. Unfortunately, most of these “part-time” judges occupied positions as deputy staff legal advisors, and notwithstanding the regulation’s injunction that “the judicial duties of military judges of special courts-martial not assigned to the United States Army Judiciary take priority over all other duty”,²⁸ they were never allowed by their commanders to spend significant time in court in diminution of their regular staff legal functions.

Over the year, only the few part-time judges who did not occupy significant staff legal positions—usually comparatively junior officers—became active on the bench, and then often as permanent in-house judges for the commands to which they were regularly assigned. There seemed no feasible way to control the assignment and use of these part-time judges from one central booking office as the regulation contemplates. Though telephone communications between most major headquarters were surprisingly good, this was not so at the many commands separated from major headquarters where special courts were frequently held. Moreover, there was no administrative facility available to the local judiciary to receive and process 450 requests for judges each month. The uneasy compromise between regulation and reality was a monthly, country-wide, circuit riding itinerary which, for a limited period, put the Judiciary judges at the disposal of each major command for whatever courtroom work might be proffered; during the remainder of the month the jurisdictions were responsible for securing part-time judges for their own cases. During my year in Viet Nam, part-time judges presided in approximately one-half of all special courts in which a judge was present; elsewhere in the

²⁷ Dept. of Army Regulation 27-10, change 3, para. 9-8b, 27 May 1969.

²⁸ *Id.* at para. 9-5a(2).

Army they sat in only one-third of the total of such trials.²⁹

Congressional legislation for special courts-martial provided only that judges "may" be present in court;³⁰ its corollary is that they also "may not." The Army's Judge Advocate General, in advance of 1 August, dunned all staff legal advisors to place judges in special courts-martial whenever possible,³¹ and an Army regulation required the detailing of a judge "whenever possible with first priority to cases involving complex issues of law and fact."³² In all those cases in which judges did not sit, as in prior practice, the senior member of the jury, untrained in law and uncomfortable in his role, was to act as both foreman and judge.³³ During the first month, August 1969, judges presided at only 17 percent of Army special courts in Viet Nam; that ratio remained constant in September but jumped to 32 percent in October. With the arrival

of more Judiciary judges in January and dribbles more thereafter, the percentages continued to increase to about 90 by fall 1970.³⁴ But for the first year in Viet Nam —1 August 1969 to 30 June 1970, judges sat in only 2,513 or 50 percent of the 4,981 Army special courts; in the same period for the remainder of the Army, judges presided in 27,307 or 86 percent of the 31,722 special courts-martial.³⁵ If one speculates why Viet Nam lagged behind the rest in getting judges into its misdemeanor trials, it must first be recognized that questions of military justice were subordinate in the scheme of priorities and attention to the combat effort itself. Too, there was certainly an initial question as to whether it was physically possible to put judges and counsel in special courts within the combat situation, and the gradualism of the opening months was undoubtedly a testing of that concern. The

²⁹ Statistics supplied by the United States Army Judiciary.

³⁰ 10 U.S.C. § 826(a) (Supp. V 1970).

³¹ JAGJ 1969/7933, 10 July 1969.

³² Dept. of Army Regulation 27-10, change 3, para. 2-15b, 27 May 1969.

³³ See, Dept. of Army Pamphlet 27-15, *Military Justice Handbook, Trial Guide for The Special Court-Martial*, May 1969.

³⁴ Statistics supplied by the Office of the Staff Judge Advocate, United States Army Viet Nam and Major E. Lasner, United States Army Judiciary with duty station at Binh, Republic of Viet Nam.

³⁵ Statistics supplied by the United States Army Judiciary. The Bayh legislation would make a judge mandatory in all special courts-martial. S. 1127, 92d Cong., 1st Sess. § 816(2) (1971).

factor of voluntarism in the law³⁶ facilitated reaction in some of the local commands; in the month of August 1969, though more than 450 special courts-martial were convened in Viet Nam, I was requested to preside in only 17 trials and the other Judiciary special court-martial judge in 22. In retrospect it is clear that had judges been mandatory in special courts-martial and had judicial duty been given first priority for part-time judges as the regulation required, then all special courts could have been covered from the beginning. Despite the slow beginning, as the year progressed most commands responded more favorably to the program, if not motivated by the quality of judicial wisdom at least anxious for the conservation of man-hours in the extraordinary rate of bench trials when judges did preside.³⁷ By the end of my year, most commands were scheming to acquire a locally stationed, full-time Ju-

diciary special court-martial judge.

The Crimes

During my tour, I sat in 320 trials; at issue were 918 separate allegations of wrongdoing³⁸—“specifications” in military usage. Appendix A is a listing of those specifications. This schedule should not be mistaken for more than it is. First, there is reason to doubt that it is representative of the whole spectrum of cases tried during that time by Army special courts in Viet Nam. Particularly at the beginning of my stint, when it was obvious to all that the best efforts of the functioning judges could not cover even the majority of trials, the various commands were selective in using judges’ time and established a priority among their cases for judicial attention—cases with difficult legal issues, cases in which a punitive discharge was

³⁶ Not until June 1970 were jurisdictions in Viet Nam even required to attempt to secure a judge in all special court-martial cases. See, USARV Supp. 1 to Army Regulation 27-10, para. 2-15b, 15 June 1970.

³⁷ If one calculates for the 2,063 special courts-martial trials in Viet Nam during my tour that there was an average trial time of two and one-half hours and the minimum of three jurors, then more than 15,000 man-hours of juror time was saved. This figure probably could have been doubled were judges present in all special courts.

³⁸ These came in an average of three per trial. Military law, unlike most civilian practice, favors litigating all known offenses at one trial (*MCM 1969 (R)*, paras. 24 and 25), but unlike their civilian counterparts, military defendants may choose to testify on the merits of only some allegations without being exposed to cross-examination on the others. Compare, *MCM 1969 (R)*, para. 149b(1) with, *United States v. Weber*, 8 Cr.L. 2343 (8th Cir., 30 Dec. 1970).

a possible punishment,³⁹ or cases in which the defense counsel had requested a judge because he perceived some advantage on the merits or in sentencing. Such factors obviously influenced both the substantive nature of allegations coming to my court and the results in my trials. But as the year progressed and more judges were available to hear cases, my trials tended toward the *vin ordinaire*. This selection process, which initially brought the more issue-laden cases to my court—and its eventual relaxation, are evidenced in my acquittal rates: 24 percent in August-September-October, 11 percent in May-June-July.⁴⁰ This changing acquittal rate may also be a function of changing standards for referring cases to trial. At the beginning of my work, the decision to send a case to special court was frequently made at intermediate command levels where professional legal advice was not always available and where expectations were tuned to the performance of the non-lawyers who previously conducted special courts; after the change-over to legally qualified counsel and judges, the initially

shocking acquittal rate and various measures which brought legal advice to authorities referring cases to trial seemed to cause a wiser use of prosecutorial discretion. Besides the distorting influence of these selection processes, it also appears that my 320 trials were not necessarily an accurate indication of the proportions of various offenses being tried in Viet Nam. Appendix B, the schedule of offenses tried from August to December 1969 in the court of John F. Naughton, the other Judiciary special court-martial judge on duty in Viet Nam in that period, reveals significant variations from my tally in the proportions of AWOL, marijuana, and disobedience offenses brought to court. Both lists are probably too small a sample of the total case work. Finally, the two Viet Nam schedules of offenses certainly do not reveal the proportional attention to various offenses in the Army as a whole. Appendix C is the schedule of specifications tried in approximately the same period by Judiciary special court-martial judge John W. Hanft in his Nurnburg, Germany jurisdiction; while surprisingly

³⁹ The statute allows a special court-martial sitting without a judge to return a bad conduct discharge if the judge's absence follows from extreme physical conditions or military exigencies (10 U.S.C. § 819 (Supp. V 1970), but Army practice prohibits imposition of the punitive discharge without the presence of a judge. Dept. of Army Regulation 27-10, change 3, para. 2-17, 27 May 1969.

⁴⁰ For the whole year, my conviction rate stood at 82 percent, a good measure below the Army-wide special court-martial rate of 93 percent. See n. 69, *infra*.

similar in the proportion of assault offenses, the German figures reveal a comparative paucity of disobedience and marijuana offenses, but many more AWOL's than appeared in Viet Nam.

AWOL Ostensibly, the disparity of court attention given absent without leave offenses is not surprising—after all, where is there to go in Viet Nam? Perhaps recognizing this, a few defendants appearing in my court found their opportunity for “French leave” in the United States while temporarily on proper leave from Viet Nam duty. Generally, if such a defendant returned to Viet Nam voluntarily, he was not likely to receive a substantial sentence. Inevitably such men would testify in mitigation that because they missed their scheduled military return flight to Asia they were obliged to pay the substantial commercial trans-Pacific air fare, and they always offered a compelling—or at least understandable—reason for their late return: “my girl friend discovered she was pregnant and we got mar-

ried”—“my wife was evicted and we had to find a new apartment.” Such excuses always went unchallenged by fact, for the possibly contradicting evidence was half a world away,⁴¹ and prosecutorial resources were not expended for such a production of witnesses in special courts-martial.⁴² In consequence, the credible excuses were believed, and sentences rarely, if ever, exceeded the penalties which might have been imposed by the Article 15 procedure. A substantial portion of the AWOL prosecutions were for the defendant's absence from his military unit while he was surreptitiously living in the Vietnamese civilian community. Generally such holidays were taken in Saigon or the South China Sea resort city of Vung Tau (Cap Saint Jacques) where the mechanisms of lotus-eating were available and the numbers of Occidental civilians and military personnel on the street made the AWOLee inconspicuous. More frequently, however, men absent from their units simply “hid out” in the more pleasant, large mili-

⁴¹ In the penalty trial, military law relaxes the general evidentiary standards for the defense. *MCM 1969 (R)*, para. 75c.

⁴² Understandably, USARV declined to bring witnesses to Viet Nam from the continental United States for the prosecution of misdemeanor trials. This practice was particularly troublesome because all military witnesses, like other servicemen, were returned to the United States after one year, and only with the greatest difficulty were they delayed even briefly from their scheduled returns. Moreover, in the fall of 1969, the United States Court of Military Appeals held in *United States v. Davis*, 19 USCMA 217, 41 CMR 217 that the testimony of witnesses on active duty in the military may not, over defense objection, be presented by deposition. *And see, United States v. Hodge*, 9 Cr.L. 2015 (USCMA, 19 Mar. 1971).

tary bases along the coast—at Cam Ranh, Nha Trang, Chu Lai and Da Nang. Living in a succession of “transient” quarters or with friends, these men were quite invisible in the glut of military personnel—or at worst, distinguishable only by the quality of their sun tans. Such absences, if not voluntarily terminated, generally ended when the absentee otherwise came to official attention because he resorted to illegal activity to support himself, or because he was unable to account for himself and provide necessary pass credentials when stopped by the military police.⁴³ A common factor in almost all these absence from unit cases was a lack of control of personnel movement. Though the Air Force insisted—at least insisted in the case of Army personnel—on travel credentials for passengers on its scheduled long distance flights, the ubiquitous “choppers” could usually be boarded with the pilot’s

permission and assurance that he was going your way; land transportation could be purchased with a raised thumb, and only rarely were vehicle passengers or pedestrians in uniform checked for proper authorization on leaving or entering military posts. Despite this, the majority of AWOL prosecutions were not for absence from the unit, but for failure to report or straying from an assigned place of work.⁴⁴ Thus, though Article 86 absence prosecutions were my most frequent litigation, 18 percent of all court work, they were less indicative of a footloose soldiery than the percentage suggests.

General Regulations—The second largest category of delicts, 11 percent of my work, were brought under Article 92(1) proscribing conduct which “violates . . . any lawful general order or regulation.”⁴⁵ This provision grants to general or flag officers in command, their superiors, and

⁴³ Military authorities, without probable cause, may examine on demand the identification and pass credentials of any serviceman, and the results of such an inquiry—with few exceptions—are admissible in court. *United States v. Nowling*, 9 USCMA 100, 25 CMR 362 (1958).

⁴⁴ In my court, counsel revealed a considerable confusion regarding the concept of AWOL from the unit and AWOL from the place of duty. The misunderstanding seemed almost always to originate in the wording of form specifications 13 and 14, *MCM 1969 (R)*, appendix 6c. The first proscribes failure to go to or going from “his appointed place of duty” and the latter prohibits absence from “place of duty”. Many prosecutors lost cases for a failure to realize that 13’s “place of duty” connotes place of work while 14’s “place of duty” refers to the duty station where the defendant lives. *United States v. Bement*, 34 CMR 648 (ABR 1964); *United States v. Sears*, 22 CMR 744 (CGBR 1956).

⁴⁵ 10 U.S.C. § 892(1) (1964).

certain others an authority similar to a civilian legislature's power to establish and define crimes by statute.⁴⁶ And as in the latter, conviction for violation of a general regulation does not require proof of knowledge of the proscription.⁴⁷ A very flexible tool for tempering criminal law to local requirements, this delegation of legislative authority⁴⁸ seems a necessary condition for a worldwide society whose legislative body, Congress, cannot afford it continuing attention. Thus interesting as a quasi-legislative response to very local conditions and problems, criminal proscription by military regulation also holds several fascinating legal issues. General regulations are numerous⁴⁹ and serve a variety of purposes in addition to criminal proscription; some state policy, others are merely instructive, and many are addressed to particular individuals and not the general military population. In one of my

trials a sergeant, who had apparently become a permanent fixture on R&R flights between Cam Ranh and Hawaii, was charged with violating a general regulation which provided, in so many words, that ". . . individuals are entitled to one R&R."⁵⁰ Everything was wrong: the regulation appeared to be addressed to personnel authorities responsible for administering the leave program; there was no prohibitive language concerning successive R&R leaves; and nothing in the regulation indicated an intent to create criminal sanctions.⁵¹ Second, like soup, the scheme of regulatory prohibitions may be done in by too many cooks. In Viet Nam, a great many commanders of all armed services with authority to promulgate general regulations dwelt in close proximity, and their regulations, often purporting to apply to all military personnel, frequently established differing norms concerning the same sub-

⁴⁶ *MCM 1969 (R)*, para. 171a.

⁴⁷ See, e.g., *United States v. Stone*, 9 USCMA 191, 25 CMR 453 (1958).

⁴⁸ The power "to make rules for the government and regulation of the land and naval forces" is originally reposed in Congress. U.S. CONST. art. II, § 1.

⁴⁹ Military legal offices contain heaping bookshelves of the printed regulations of all superior headquarters.

⁵⁰ USARV Regulation 28-5, 23 February 1968.

⁵¹ Charging this conduct as a violation of the regulation was a matter of convenience, not necessity. If the defendant had done as alleged, the case might have been tried as an AWOL (10 U.S.C. § 886 (1964)) or as a defrauding the government of the round trip air fare to Hawaii. 10 U.S.C. § 934 (1964).

ject matter—particularly in the case of “off limits” restrictions. Because it made little sense and detracted from morale to allow members of one unit or service freedom in a civilian area from which others were excluded, regional “coordinators”—usually a major commander in the district—were appointed to publish yet another set of regulations on the same subject. Of doubtful legal efficacy in themselves,⁵² the coordinator regulations frequently conflicted with the regulations and orders of the other resident commanders and even with those of the promulgator himself authored in his non-coordinator capacity. For the judge, sifting through theories of preemption and the relative regulatory clout of the various commands was often impossible. Finally, and compounding the other difficulties inherent in regulatory prohibition, these provisions were too frequently drafted by non-lawyers. At Cu Chi, 20 miles west-north-west of Saigon, I presided in the trial of a soldier alleged to have consumed whiskey at an artillery fire base contrary to regulation. That provision, which I later learned was drafted by a non-lawyer in the Division’s personnel office, touched many subjects and stipulated that soldiers at such fire bases are “pro-

hibited from consuming more than two cans of beer per day;” it said nothing else of intoxicants.⁵³ If the author intended an exclusion of all other alcoholic beverages, his choice of language failed his ambition—as, hopefully, any lawyer assisting in the drafting of such a document would perceive.

Most intriguing of the “regulated” subjects in Viet Nam was currency control—a broad and elaborate scheme for keeping out green dollars and dollar instruments. Perhaps justified in fact by the domestic inflation likely to follow an infusion of foreign money, the regulations, in the popular view of our troops, were thought designed to keep “green” out of enemy hands. Whatever their purpose, next to the “Welcome to Viet Nam” sign at the airport was a money exchange office where all military personnel were obliged to convert their United States currency and dollar instruments—including travelers checks—into military payment certificates—known as “MPC” or, more irreverently, “funny money.”⁵⁴ MPC was the medium of exchange in all U.S. military facilities—the PX, bank, barber shop, clubs—and foreign-owned concessions on military posts—steam baths, restaurants, souvenir shops. To do business with Viet-

⁵² See, *United States v. Tassos*, 18 USCMA 12, 39 CMR 12 (1968).

⁵³ 25th Infantry Division Regulation 210-3.

⁵⁴ Military Assistance Command Viet Nam (MACV) Directive 643-1.

namese civilians outside the military enclave, one was required by regulation to convert MPC to Piastres through military facilities at the then official exchange rate of 1:114, but in any bar on Saigon's Plantation Road, the rate was at least twice as favorable.⁵⁵ To halt or at least discourage the accretion of MPC in Vietnamese, one surprising morning all U.S. military bases were barred, and inside a new issue of currency exchanged for the old—which was henceforth valueless. Gallons of Saigon tea had been drunk for nothing, and stories, perhaps apocryphol, were told of Oriental entrepreneurs doing suicide atop trunks-full of the old issue.

In special courts-martial, these currency restrictions initially surfaced in prosecutions for violation of regulations which required that whenever one purchased dollar instruments (e.g. bank deposits, treasury checks, travelers checks, bank drafts, military savings deposits, postal money orders) he must file a form indicating the source of his MPC and whether his dollar instrument purchases had exceeded \$200 that month; if beyond that amount, the purchaser was required to present an authorization document signed by his commanding officer. In court

for violating such requirements, defendants frequently told of being given wads of MPC by Vietnamese "papasans" for the purchase of American bank drafts or postal money orders; on returning the dollar instrument to the papasan they were paid a commission in MPC. Inevitably such dealing took place in amounts greater than \$200 per month, but in each individual transaction, in order to explain his lack of the over-\$200 authorization document, the buyer indicated on the purchase form that he was under the \$200 limit that month. These purchase forms were all stamped over the buyer's plastic identification card, and ultimately fed into a dyspeptic data processing machine which disgorged printouts of the more active patrons' transactions. These offenses were first prosecuted as violations of MACV (Military Assistance Command Vietnam) Directive 65-50, but in *United States v. Baker*,⁵⁶ the United States Court of Military Appeals held that the regulation was not punitively directed to errant purchasers. Then followed a season of trials drawn under MACV Directive 37-6, 17 April 1968, until a three-man panel of the United States Court of Mili-

⁵⁵ I spent a good deal of time wondering what became of the difference between money exchanged in military facilities at the official rate and the real market value of those dollars. It was rumored that most military personnel in Saigon changed their money on the street; I was unable to discover any prosecutions for such improper conversions.

⁵⁶ 18 USCMA 504, 40 CMR 216 (1969).

tary Review⁵⁷ in *United States v. Benway*⁵⁸ held the regulation impotent under the *Baker* rationale. Although the first *Benway* result was soon contradicted by the United States Court of Military Review in an *en banc* opinion⁵⁹ and ultimately overturned by the United States Court of Military Appeals,⁶⁰ and notwithstanding careful attempts by staff legal officers to redraft punitive regulations on the same subject,⁶¹ prosecutors were justifiably wary of pursuing the matter as a violation of Article 92 and turned instead to Article 107 which provides:

Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct. 10 U.S.C. § 907 (1964).

For purposes of these prosecutions, the false official document was the defendant's dollar instrument purchase form which invariably and falsely represented that he had made less than \$200 in purchases that month.

But the final solution for the problem was prevention, not prosecution. Since transactions in dollar instruments between individuals in Viet Nam was prohibited,⁶² the only substantial legitimate purpose of such negotiable instruments was to transfer money back to the United States. Those selling dollar instruments subsequently required that the money order or draft never be physically surrendered to the purchasers, but that the latter provide an envelope addressed to the recipient in the United States; the instrument was mailed by the seller, and no diversion was feasible.⁶³ With this practice, prosecution for im-

⁵⁷ The United States Court of Military Review (formerly the Board of Review) is the intermediate appellate military court and the United States Court of Military Appeals the highest court.

⁵⁸ No. 420976 (AGMR 12 Sept. 1969).

⁵⁹ *United States v. Chisholm*, 41 CMR 643 (1969), *aff'd* 19 USCMA 352, 41 CMR 352 (1970).

⁶⁰ *United States v. Benway*, 19 USCMA 345, 41 CMR 345 (1970).

⁶¹ USARV Regulation 600-291, 27 April 1969.

⁶² *Id.* at para. 30.

⁶³ The purchaser could provide an envelope with a false address and patiently wait its return by postal authorities; too, the dollar instrument might be returned to the sender by a confederate in the United States. However, it seems unlikely that the papasans would trust their money in such distant, delayed and uncertain channels.

proper dollar instrument purchases substantially disappeared.

Pot and Pills Seventy-four trials, more than 23 percent of the prosecutions in my court, included among the allegations a drug or marijuana offense.⁶⁴ Of the 88 separate specifications alleging such crimes, 68 were for marijuana, one amphetamine prosecution, four opium or heroin cases,⁶⁵ and the remainder barbiturates. The prosecutorial emphasis on marijuana and barbiturates was a reflection of the comparative availability of these two substances in the Vietnamese economy. Marijuana was in fact hawked along the roadside, packaged in bulk in plastic bags, in repacked Salem cigarettes placed in artfully resealed packs, or in rolled cigarettes of various shapes and colors. Its incredible availability and the aggressiveness of its salesmen were apparent when USARV's three-star commanding general, while inspecting construction in the countryside, was allegedly approached by an aged mamasan who offered, in broken English, to sell him pot. Barbiturates, usually under the brand name of "binocotol" or "Immenocotol"—both domestically produced

non-prescription sleeping preparations which were packaged in French labelled plastic pill boxes or individually sealed in tin foil—were available for a very small sum at Vietnamese apothecaries. Only three of the 88 drug-marijuana cases alleged use of the substance; the rest alleged possession.

The manner of alleging these offenses—and particularly the marijuana offenses—disclosed a shifting view among commanders responsible for lodging these charges. Over my whole year, though marijuana-drug offenses appeared in more than 23 percent of my trials, they comprised less than ten percent of all specifications before the court; apparently marijuana-drug offenses were disproportionately the subject of single allegation trials. In my first six months, such allegations were present in 38 trials—in 12 of which non-drug offenses were joined; of the 26 cases proffering only drug-marijuana charges, 23 were built solely upon a marijuana offense. But from February through July 1970, of the 36 trials including drug-marijuana charges, non-drug offenses were joined in 24; of the 12 drug-only

⁶⁴ Possession, use and sale of marijuana and habit-forming narcotics may be prosecuted under 10 USC § 934 (1964). Other drug offenses might be prosecuted in Viet Nam as violations of Dept. of Army Regulations 600-50 and 600-32. See generally, *United States v. Walther*, — USCMA —, — CMR — (1971).

⁶⁵ Recent press reports from Viet Nam suggest an upsurge in heroin use; whatever the fact may be now, heroin use was infrequently prosecuted in 1969-70.

cases, eleven were solely concerned with marijuana. Hidden in this clutter of numbers is the fact that marijuana-only trials, once two-thirds of drug related litigation, sank to one-third of such cases. Less and less the court was being used as a response to marijuana, and the Army was experiencing the same relaxation of the marijuana prohibition which is occurring in the United States.⁶⁶ For the Army in Viet Nam, this "wind down" was inevitable; the Army is chiefly composed of men of the age group in which the new marijuana ethic is found, and the inability of domestic United States authorities to enforce the old norm in a setting in which marijuana is contraband suggests the result in Viet Nam where it is openly possessed and used by civilians.

Perhaps the most surprising aspect of the marijuana-drug prosecutions was the frequency of acquittals. Though the conviction rates for special courts-martial in Viet Nam with judge,⁶⁷ without judge,⁶⁸ and my own conviction rate for trials without drug-mari-

juana charges all stood at 86 to 88 percent,⁶⁹ my conviction rate for cases in which such allegations were present was 67 percent. Moreover, when the 88 drug-marijuana specifications are considered separately, they reveal that acquittals exceeded convictions, 46 to 42. My notes, though not as complete as I might wish with regard to this matter, indicate that half or more of the not guilty findings on these specifications followed from a defective search. The reasons for this are found in the comparative position of the special court as a criminal forum, the military law's unfortunate substitute for the magistrate's warrant, and the qualifications of those who most often conduct these searches. Notwithstanding its jurisdiction over most offenses, the special court's limited sentencing power makes it most analogous to a civilian misdemeanor court; cases referred to it are prejudged as "minor" and not meriting the greater penalties possible in general courts-martial.⁷⁰ These conclusions, though after the fact,

⁶⁶ See, e.g., *Governor asks pot law reform*, Chicago Daily News, 15 April 1971 at 1, col. 6; *Drug users get choice: jail or class*, Chicago Daily News, 22 Feb. 1971 at 1, col. 4.

⁶⁷ Statistics supplied by the United States Army Judiciary.

⁶⁸ *Id.*

⁶⁹ Army Judiciary statistics disclose that for the same period the Army-wide special court-martial conviction rate was 93 percent. The lower rate for Viet Nam may be attributable to a greater percentage of AWOL prosecutions elsewhere—cases which are easily proved by documentary evidence.

⁷⁰ See, *MCM 1969 (R)*, paras. 30h and 31h.

have their reflection in the quality of investigative process which precedes prosecution. Unlike the elaborate and focused inquiry by senior investigators which often precedes general court-martial charges, special court cases most frequently arise from chance encounters between the defendant and military police "on patrol" or from the investigative activities of the defendant's commanding officer. Too, far fewer prosecutorial resources are expended in preparing special court-martial cases than are invested in a general court: less time is spent before trial by lawyers in study of the case,⁷¹ witnesses were allowed to return to the United States from Viet Nam before the special court-martial trials in which their testimony was required,⁷² and prosecution counsel were frequently unable, because of distance and other duty demands on themselves and the witnesses, to interview and prepare their witnesses before trials. In one of my up-country marijuana cases, a Saigon MP arrived by chopper during the opening minutes of the trial; the prosecutor, unable to meet with the witness

before, had prepared his case on the basis of the policeman's written report—as it developed, a most misleading version of his testimony at trial. Additionally, the persons most frequently responsible for the searches which disclose contraband are not aware of the legal niceties of their acts. Military law grants to the commanding officer of a unit the magistrate's power to authorize investigatory searches of persons and property within his unit on the basis of probable cause.⁷³ Understandably unaware of the convolutions of the Fourth Amendment and not bothering to secure professional legal advice—or without access to it, commanders not infrequently take action that could curl the pages of *Aguilar v. Texas*.⁷⁴ In one of my cases, the defendant was seen in possession of contraband by a reliable informant who passed the information to a junior officer; the latter filtered out the informant's identity and all circumstances of the encounter in reporting to the commander, "I've information that X has heroin," and on this the commander searched out and seized the material in the defendant's

⁷¹ A written, pretrial legal memo is required for charges referred to trial in general court-martial but not for allegations tried by special court. *Compare*, 10 U.S.C. § 834 (1964) and *MCM 1969(R)*, para. 34 with, Dept. of Army Regulation 27-10, change 3, para. 2-16d, 27 May 1969 and *MCM 1969 (R)*, para. 33.

⁷² N. 42, *supra*.

⁷³ *United States v. Hartsock*, 15 USCMA 291, 35 CMR 263 (1965).

⁷⁴ 378 U.S. 108 (1964).

quarters. Exclusion was unavoidable but unnecessary; two well put questions to the junior officer could have legitimized the intrusion. Military policemen appearing in my court to justify contraband seizures were usually young soldiers with little military rank and limited law enforcement experience and training. In the typical case they were done in by the limitations of search incident to arrest: the two MP's on patrol approached the defendant on the street and properly discovered that 1) the defendant's uniform was improper—generally, he lacked a helmet or hat, or 2) he was in an off-limits area, or 3) he lacks proper pass credentials; for this they placed the defendant in their jeep for a ride to the MP headquarters where, if the defendant was a member of a local unit, he sat on a bench in the office until his first sergeant came to take custody of him. At issue was the extent of search of the defendant's person before he was placed in the jeep. In my view, such an intrusion can go no further than that reasonably necessary to insure the physical safety of the po-

licemen—a “pat down” for weapons.⁷⁵ But the military police, inevitably searched the defendant down to his sox, along the way emptying the contents of a cigarette package and discovering marijuana. Asked why they removed the cigarette package from the defendant's pocket and looked into it, the policemen usually answered that they were merely searching for weapons which might be used against them. Their claim was that a razor blade could be concealed in the package. My inquiries in Viet Nam disclosed that no cases of such assaults were known. The rationalization was fatuous, and it appeared that the minimal cause arrest and detention was systematically being used as a pretext for exploratory contraband searches. Not in my court.

Homicide Eleven homicide trials were before me, the 12 defendants responsible for 20 corpses. In all but two cases, these defendants were charged with negligent homicide, requiring for conviction that the act causing death constitute simple negligence;⁷⁶ the remaining pair

⁷⁵ *United States v. Daily*, No. 423611 (ACMR 26 Mar. 1971) (dictum); *accord*, *Sibron v. New York*, 392 U.S. 40 (1968); *United States v. Robinson*, 8 Cr.L. 2179 (CADC 3 Dec. 1970); *State v. Meeks*, 8 Cr.L. 2174 (Mo. 9 Nov. 1970); *cf.* *United States v. Santo*, 20 USCMA 294, 43 CMR 134 (1971).

⁷⁶ 10 U.S.C. § 934 (1964) “The term . . . negligence is defined in [the military law of homicide] . . . as the absence of due care. It is an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.” Dept. of Army Pamphlet 27-9, change 1, *Military Judges' Guide*, para. 4-154, 22 October 1969.

of trials were for manslaughter by culpable negligence—that is, a negligent act “. . . accompanied by a gross, reckless deliberate or wanton disregard for the foreseeable consequences”⁷⁷ Of the latter prosecutions, only one resulted in a conviction, and that for the lesser included offense of negligent homicide. The factual circumstances surrounding these homicides grouped into distinct categories: three trials concerned incidents in which the defendant had neglected to unload his gun before undertaking to clean it, and it discharged while being disassembled; in three more cases the fatal shot was fired while the defendant was holding and manipulating a firearm; four trials resulted from deaths in vehicle traffic mishaps; one case arose from a combat incident in which the defendant shot one of his own squad members during a fire-fight with the enemy. Though ten of

these eleven trials proceeded on pleas of not guilty, in only one case was the principal issue the slayer's identity; for the rest the only contested issue was whether the defendant's conduct constituted that level of negligence required for conviction.

In several respects these homicide trials were quite unique from other special courts-martial. A majority of these trials—six—were to the jury; in these, four defendants were acquitted and neither of those found guilty were sentenced by the jury to the stockade. The five homicide bench trials—which included the one guilty plea—resulted in three guilty findings and two stockade sentences. But it is unlikely that either of those defendants were actually confined: one had plead guilty pursuant to a bargain which provided for suspended confinement,⁷⁸ and the other was a first offender, also likely to have

⁷⁷ *Id.* at para. 4-97.

⁷⁸ In military practice, the convening authority—the military commander who refers the case to trial—is empowered to reduce any finding of guilty or sentence that the court-martial may return. 10 U.S.C. §§ 861-64 (1964). Guilty plea bargains are negotiated between the defendant and the convening authority, the latter agreeing to reduce any adjudged punishments to certain, specified penalties. *See, e.g., United States v. Veteto*, 18 USCMA 64, 39 CMR 64 (1968). The existence and terms of such a deal must be concealed from the jury. *United States v. Withey*, 25 CMR 593 (ABR 1958). The judge is obliged to examine the providency of the plea and the terms of the agreement in an out-of-court hearing (*United States v. Care*, 18 USCMA 535, 40 CMR 247 (1969)), but better practice requires that when the judge is sentencing without jury he delay examination of the deal's *quid pro quo* until after he has returned a sentence. Dept. of Army Pamphlet 27-9, *Military Judges' Guide*, para. 3-1; *cf. United States v. Villa*, 19 USCMA 564, 42 CMR 166 (1970).

his confinement suspended.⁷⁹ These are indeed extraordinary patterns: a majority of jury trials, a majority of acquittals, and only one defendant with a hope of jail time—all this despite the undisputed presence of 20 corpses.

These extraordinary consequences are attributable to the curious nature of the negligent homicide offense and the color of such prosecutions in special courts-martial. It is, of course, initially surprising to confront a homicide prosecution in a special court-martial where the punitive sanctions are so limited. To jurors and judge such a referral of a case readily indicates a preliminary judgment by the defendant's commanders that his culpability, if any, is minimal. This aura of absolution is heightened when, as in eight of the eleven homicides tried in my court, the referral to trial by the command did not include those procedural steps which would empower the court to adjudge a sentence including a punitive discharge.⁸⁰ And the sense of prior dispensation is even more acute if, as in two of my trials, the defendant is a commissioned officer; the special court-martial has no sentencing powers over officers but limited financial

penalties and a brief restriction to quarters.⁸¹ Indeed, even the referral of a homicide case to special court-martial sometimes failed to betray the lenity with which the defendant's commanders viewed his offense. In one trial the defendant, a Specialist E-5, plead guilty to having killed a fellow soldier; a stipulation of facts revealed that the defendant, slightly intoxicated, was in his quarters toying with a machine-gun which he had previously loaded; it discharged through the wall. Sitting without jury, I accepted the plea and sentenced the defendant, *inter alia*, to confinement at hard labor and reduction to the lowest enlisted grade, E-1. Later I discovered that the defendant's plea was bargained with the brigadier general who convened the court, in exchange for enforcement of no more of my sentence than provided for suspended confinement and reduction to private first class, E-3. If the government's punitive interests were so limited, why was the matter not disposed of as an Article 15? Occasionally one suspected that such cases came to court not because of a strong prosecutorial belief in the defendant's culpability and guilt but from

⁷⁹ Text at n. 95, *infra*.

⁸⁰ For the special court to return such a penalty, the case must have been referred to trial by a commander with authority to direct charges to trial in a general court-martial, and a court reporter must be provided to keep a verbatim record of trial. *MCM 1969 (R)*, para. 15b; Dept. of Army Regulation 27-10, change 3, para. 2-16, 27 May 1969. See n. 11, *supra*.

⁸¹ *MCM 1969 (R)*, paras. 126 and 127.

a desire to utilize the special court-martial process—where the risks of penalty were limited—as a mechanism for putting to rest an administrative “hot potato.”

Beyond these mixed prosecutorial motives, negligent homicide cases are further afflicted by the nature of the crime itself. If the defendant's lapse is truly no more than simple negligence, then clever defense counsel can infect every juror or judge with the there-but-for-the-God-go-I syndrome. This strategy worked very well in a Viet Nam prosecution before jurors with combat experience; the defense merely proved that at night, during a fire-fight, the defendant allowed his field of M16 fire to stray too close to the position of another soldier in his unit; the jurors did the rest, hardly allowing the door of the deliberation room to close before returning their finding of not guilty. And in a Taiwan trial, defense counsel in a careful voir dire established that all his jurors personally drove private motor cars in Taipei and were therefore familiar with the city's frenetic streets and pedestrian bravado; notwithstanding my instruction dismissing an excuse of contributory negligence, defense counsel won acquittal by balancing off a set of persuasively long tire marks against the victim's presence in traffic lanes as a pedestrian far from a cross-walk. A defendant whose only failing is negligence is no different from the rest of

humanity, and in the eye of the court no sense of criminality or moral opprobrium attaches to him. Very frequently such defendants are above the cut of the average individual, their testimony wholly credible, and their good character enthusiastically established by the testimony of military peers and superiors. Often in these cases the defendant and his victim were close friends, and the defense presentation will include moving evidence of that personal relationship and the defendant's emotional anguish following the death. If found guilty in such circumstances, the defendant's “correction” or “rehabilitation” is a ridiculous concept, and even in the gun mishap cases jurors were uninfluenced by prosecution sentencing arguments that the defendant should be punished as an example to encourage others to gun safety. In sum, if the defendant's only wrong was simple negligence, his trial was likely to accomplish little.

The Bench Trial Option

The preference for jury trial among a majority of the homicide defendants conflicted sharply with overall practice in my court. Though in August 1969—when counsel were unfamiliar with the newly available option—a significant portion of defendants selected jury trial, thereafter their numbers sharply declined, and over the whole year less than ten percent of my trials were before

jurors.⁸² It soon became clear that though the law required a written and in-court verbal waiver of the jury trial right by the defendant,⁸³ in fact the pressure of decision moved from the other direction; it seemed that jury trial was always waived unless the defendant had a good reason for doing otherwise. An authoritative explanation for why this was so must come from defense counsel, not me, but I hazard that the following intangible factors were of some importance: administratively it was certainly more convenient to try a case to the judge. Logistically it was troublesome to secure jurors in the midst of war, and defense counsel—though not in the instant case responsible for the trial arrangements⁸⁴—might well find himself prosecuting the next case against today's trial counsel; too, the defense counsel was a member of the command legal staff and probably aware of the significant manpower savings inherent in bench trials.⁸⁵ Second, preparation for a bench trial was quicker and easier: there are no voir dire responsibilities, instructions need not be

formulated and proffered; findings and sentence arguments are often minimized, much trial posturing and maneuvering is unnecessary, and the judge often assumes a greater role in guiding the trial. An itinerant judge is less likely to be personally affronted by the defendant's wrongdoing or subjected to command pressures than are the local jurors, and the judge's contact with law enforcement in many special court-martial jurisdictions probably fosters a more catholic viewpoint toward trial and sentencing. Too, the judge soon becomes known to counsel and—to the extent that predictability is a substitute for trust—preferable to the enigmatic jury. Too, counsel probably believed that judges gave less severe sentences than juries.

Counsel's motives in a particular trial for going to the jury—as happened in 28 of my cases—seemed more patent. More than half of these jury cases concerned homicides or assaults, the latter often including complicated facts of a self defense issue. Overall, the juries proved generous with the homicides, but not so with the

⁸² Only eight percent of the defendants in my court opted for jury trial; the figure was the same for the remainder of special court-martial judges in Viet Nam during the same period. Statistics supplied by the United States Army Judiciary. No defendants in my court exercised their right to be tried by enlisted jurors.

⁸³ *United States v. Dean*, 20 USCMA 212, 43 CMR 52 (1970).

⁸⁴ In military practice, the prosecutor bears responsibility for logistical arrangements for trial. *MCM 1969 (R)*, para. 44.

⁸⁵ N. 37, *supra*.

assaults. A common denominator for jury trials was the defendant's impressive appearance and demeanor and his ability to be an articulate witness for the defense. Some defense counsel, when representing senior noncommissioned officers, justifiably relied on the jury to give deference to the defendant's rank and years of service.⁸⁶ In several cases defense counsel relied upon the juror's personal knowledge of facts outside the judge's ken; one case, for example, depended in substantial part upon proof of the good character of the defendant,⁸⁷ and here counsel utilized jurors drawn from the defendant's battalion who were personally familiar with him and the officers called to testify as his character witnesses. Playing Monday morning quarterback to the jurors, I concluded that in those 28 trials a quarter of the findings and half the sen-

tences were more generous than I might have returned, but in two trials the use of a jury was disastrous. Such an estimation only indicates that jury trial is a viable alternative and that counsel chose well. The wisdom of their selection appears in the jury's results: of the 28 cases, seven were acquittals; of the seven trials in which a punitive discharge was an authorized punishment, only once was it adjudged; and only eleven of the 21 convicted defendants were sentenced to jail by the jury.

I had supposed that in order to enhance opportunities for an appellate finding of error⁸⁸ there might be a resort to jury in those cases in which the defendant was exposed to greater potential punishments.⁸⁹ Only those special court-martial cases in which a bad conduct discharge is adjudged are subjected to automatic judicial re-

⁸⁶ Text at n. 108, *infra*.

⁸⁷ Military law holds general proof of good character to be admissible on the merits. *MCM 1969 (R)*, para. 138f(2).

⁸⁸ Appellate military courts are more critical of procedure, use of evidence and argument in jury contests than in bench trials. *United States v. Martinez*, — CMR — (ACMR 26 October 1970); compare, *United States v. Wood*, 18 USCMA 291, 40 CMR 3 (1969) with *United States v. Sumner*, SPCM 6116 (ACMR 30 October 1970).

⁸⁹ In almost all cases tried in my court the defendant was exposed to the ordinary special court-martial jurisdictional limitation of confinement at hard labor for six months, reduction to the lowest enlisted grade, and forfeiture of two-thirds pay per month for six months. 10 USC § 819 (Supp. V 1970). The only differentiating factor appeared in those trials in which a bad conduct discharge was an authorized punishment.

view,⁹⁰ thus the theory suggests that such defendants would have a higher rate of jury use than defendants in other cases. Practice in my court gave little support to the theory. Of these defendants appearing in the 70 trials in which a bad conduct discharge was a possible punishment, only seven—ten percent—chose jury trial; among the 250 other defendants not exposed to such a penalty, 21 or nine percent chose a jury. The sample is limited and the percentage difference so small that it is difficult to infer any support for the theory. Indeed, the numbers suggest the converse: that the greater potential penalty and prospect of automatic appellate review were not

major inducements to jury trial. Much of the same kind of conclusion attends any effort to relate cases in which the defendant plead guilty to selection of the jury alternative. Of the 80 trials resolved in whole by guilty pleas—25 percent of all my cases,⁹¹ only nine defendants—11 percent—went to juries; those 240 defendants contesting one or more of the specifications sought the jury in only 19 cases—8 percent. Again, no significant difference in jury use between defendants who contest or plead their cases.

Sentencing

For an Army commander contemplating legal proceedings against a soldier, the chief dif-

⁹⁰ 10 U.S.C. §§ 65(b), 66 and 76 (1964) *as amended* (Supp. V 1970). Special court cases not including a bad conduct discharge are administratively reviewed at the superior headquarters exercising general court-martial referral authority (Dept. of Army Regulation 27-10, change 3, para. 2-4b, 27 May 1969) and may be appealed by the defendant for further administrative review by the Judge Advocate General. 10 U.S.C. § 869 (Supp. V 1970); *and see*, Dept. of Army Regulation 27-10, change 4, chapt. 13, 6 June 1969.

⁹¹ In the recent past, 65 percent of all Army general courts-martial cases have been resolved by guilty pleas, three-fourths of which resulted from negotiated "deals." Vol. 1, no. 2, *The Advocate* at 1, April 1969 (newsletter for military defense counsel published by Defense Appellate Division of the United States Army Judiciary). The comparatively low percentage of guilty pleas for my special court jurisdiction in 1969-70 might result from a number of factors. Since lawyers had not previously practiced in Army special courts-martial, negotiated pleas were probably unknown to convening authorities and initially resisted. Because of the jurisdictional limitation on special court sentencing powers, there is less "room" for plea bargaining maneuvers: for the defendant, the maximum sentence he risks in special court is far less than that possible in a general court-martial, and hence he is less motivated to "cop out"; for the prosecution, any agreement of substantial benefit to the defendant would leave a penalty not much beyond that which could be achieved through the Article 15 administrative procedure. In Viet Nam, all these reasons were heightened by local regulations which required administrative probation for most confinement adjudged in special courts.

ference between special court-martial and Article 15 punishment is that the former could serve up confinement at hard labor in the stockade while the latter could not; but for confinement, the Article 15 could impose sanctions sufficient for most minor offenses.⁹² However, a special court-martial's sentence to confinement in Viet Nam did not necessarily insure that the defendant would find himself in the stockade. To be enforced, sentences adjudged by military courts must be executed by a command order,⁹³ and it is

the option of command to modify or refuse enforcement of the court's sentence.⁹⁴ Moreover, a particular commander's option to enforce sentences may be subject to constricting orders from superior commands. Such was the case in Viet Nam: USARV decreed that special court-martial sentences to confinement would be suspended,⁹⁵ except 1) if a bad conduct discharge was also adjudged, 2) the defendant had a prior conviction, or 3) exceptional cases involving serious offenses.⁹⁶ If a defendant was incarcerated

⁹² Compare, 10 U.S.C. § 815 (1964) with 10 U.S.C. § 819 (Supp. V 1970).

⁹³ 10 U.S.C. § 857 (1964) as amended (Supp. V 1970).

⁹⁴ The convening authority may reduce the severity of any portion of an adjudged sentence (10 U.S.C. § 864 (1964); *MCM 1969 (R)*, para. 88), commute adjudged penalties to other less severe forms of punishment (*Id.*; see, e.g., *United States v. Brown*, 13 USCMA 333, 32 CMR 333 (1962) (convening authority may commute bad conduct discharge sentence to confinement at hard labor for six months, reduction from staff sergeant to private E-1, and forfeiture of \$43 per month for six months)), suspend enforcement of certain elements of the adjudged sentence (10 U.S.C. § 871(d) (Supp. V 1970)) and defer enforcement of confinement. 10 U.S.C. § 857(d) (Supp. V 1970); *MCM 1969 (R)*, para. 88f. These powers extend only to lenity; there is no power in the convening authority or anyone else to increase the penalties adjudged in court. 10 U.S.C. § 864 (1964).

⁹⁵ "Suspension" is the military equivalent of probation; the suspended portion of the sentence is not enforced during a term specified by the convening authority. On expiration of the term, the suspended punishment is withdrawn. *MCM 1969 (R)*, para. 88e(3). Unsatisfactory conduct by the defendant during the term may result in "vacation" proceedings—a hearing, withdrawal of the suspension, and enforcement of the penalty. *MCM 1969 (R)*, para. 97. The power to suspend portions of the sentence is lodged solely in the convening authority and may not be exercised by the sentencing judge (*United States v. Pierce*, SPCM 6145 (ACMR 23 Dec. 1970)), jury (*United States v. Woods*, 12 USCMA 61, 30 CMR 31 (1960)), or appellate military court. *United States v. Samuels*, 10 USCMA 206, 27 CMR 280 (1959).

⁹⁶ USARV Supp. 1 to Dept. of Army Regulation 27-10, para. 2-35, 15 June 1970.

under the second or third exceptions, he was generally retained in the stockade only 30 days and then transferred to a unit other than that in which his difficulty arose—or he was “processed” for an administrative discharge from the Army. Assuming that the suspension rule functioned with only its first two exceptions, I make the following projection as to the disposition of the 109 defendants tried in my court from February through July 1970 who were sentenced to confinement:⁹⁷ 27 would be confined because the sentence included a bad conduct discharge; nine would be confined because of prior convictions;⁹⁸ and the remaining 73 would receive suspended sentences. The question of whether a particular defendant would be jailed is easy enough to calculate from the first two exceptions to the suspension rule, but the third exception, in practice, was very slippery. A majority of commands *usually* took the view that offenses tried in special court, *ipso facto*, were neither exceptional nor serious; for some, however, a most prosaic offense might be so categorized and bring the defendant to jail. But undoubtedly the great majority of

defendants sentenced to jail in my court never got there. Depending on a commander's view of the suspended sentence as a corrective or deterrent force, the low percentage of defendants actually finding their way to jail might convince him to forgo misdemeanor court proceedings; indeed, one command followed such a policy, utilizing Article 15 or general courts-martial only.⁹⁹

These confinement suspension policies posed difficult questions for the judge in returning special court-martial sentences. When a case is tried to the jury, it is customary to instruct them: “You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. Dept. of Army Pamphlet 27-9, *Military Judges' Guide*, para. 8-2, May 1969. And it is error for the jury to rely on such factors.¹⁰⁰ This rule was probably spawned by the often damned, old military jury practice of returning the maximum penalty to enhance the prestige and disciplinary authority of the defendant's commander; after such a sentence the commander, through his power to modify the sentence,

⁹⁷ During this period 155 defendants were tried in my court; of these, 20 were acquitted and 26 others were not sentenced to confinement.

⁹⁸ Only 15 of all defendants in my court during this period had previous convictions; of these, six received bad conduct discharges.

⁹⁹ Confinement adjudged in general courts-martial was not subject to the suspension rule.

¹⁰⁰ See, e.g., *United States v. Ellis*, 15 USCMA 8, 34 CMR 454 (1964).

was actually responsible for fixing the penalty. Clearly the military jury was prohibited from considering the USARV suspended confinement policy in returning a sentence, and it is arguable that the sentencing judge is similarly restricted.¹⁰¹ Yet not to consider these administrative realities is ostrich-like and conducive to grossly inappropriate sentences. For example, if one is certain confinement will be converted to probation, a far greater term of confinement is reasonable than if the confinement is actually to be served. But there was little certainty in the application of the suspension policy because of the "exceptional and serious case" rule.¹⁰² And this was the judge's sentencing box. My personal and unsatisfactory resolution of the problem was to sentence on the assumption that my penalties would be executed; those who tampered with my result were responsible for forging their own cogent sanction.

The USARV suspension policies followed from a spectrum of considerations: among others, a humanitarian desire to keep

young soldiers out of jail, a recognition that time in confinement consumed the manpower potential of both the defendants and stockade custodial staff, and finally the limitations of the confinement facility itself. Though small numbers of Army personnel might be kept in pretrial confinement at the Marine brig in Da Nang,¹⁰³ all other prisoners in Viet Nam were kept in the stockade at Long Binh, known popularly as "LBJ", Long Binh Jail. Since subject to extensive physical improvements, the jail in 1969-70 was contained within a double line of high, metal link fencing which was interspaced with guard towers. The fence was completely covered with canvas, which eliminated the inmates' view of the outside world—and vice versa. The compound itself—wholly barren but for buildings, internal fences and sweltering under the inevitable sun—was divided into several sections containing administrative offices, work areas, mess hall and living quarters for the various categories of prisoners. Men held in the least rigorous restraint were housed together in groups

¹⁰¹ Military Judge Memorandum No. 51, JAGVA, 4 November 1969; *cf.*, *United States v. Carroll*, 20 USCMA 312, 43 CMR 152 (1971).

¹⁰² Of course, in all military trials it is *possible* for the convening authority to modify the sentence, but in Viet Nam it was *probable*—sometimes.

¹⁰³ Unlike the USARV stockade at Long Binh, the Da Nang brig was not located within a larger base but on the periphery of military compounds clustered about the city. In the case of threatened enemy attack, some of the prisoners were issued firearms to assist in the defense—a curious practice.

of 40 within one-story, tropical barracks buildings; men in maximum confinement lived alone in a narrow, naked plywood walled room or in equally bare "connexes"—approximately 5' x 7', ventilated, metal overseas shipping crates. In the course of my tour, two Military Police Corps lieutenant colonels presided as commandant at LBJ. The first, an irrepresible optimist, doted upon the physical improvements he had made in the jail since its substantial destruction in 1968 rioting. His greatest dissatisfaction with the jail—its over crowded condition—he expressed one day by grabbing my lapels in mock hysteria and urging that I dismiss more cases on speedy trial motions. A curious plea from a jailer? In fact, keeping the jail population below 425, a number itself above the comfortable capacity of the facility,¹⁰⁴ was a continuing battle and probably the chief motive for the suspended confinement rule for special court-martial first offenders. Strangely, no law enforcement authorities suggested to me that the jail population problem be alleviated by judges returning fewer sentences to confinement.

I met the second confinement officer only once—in the course of a June 1970 briefing and tour of the stockade for special court-martial judges. The briefing by the lieutenant colonel began in an

office within the stockade but was soon interrupted by a prisoner outside chanting the colonel's name and then bursting into the room demanding medical attention. The colonel "lost his cool" and screamed for a guard to remove the man; afterwards he explained that the stockade psychiatrist had found the prisoner emotionally disturbed. The incident well illustrated that LBJ, like its civilian counterparts, was not wholly controlled; as the colonel put it, a good day was one in which a major disturbance did not occur. He also explained that 75 percent of the prisoners were black men, and that finding themselves in the majority, they had established a code of black racism within the jail.¹⁰⁵ According to credible rumor, black prisoners at LBJ had enforced segregation in the minimum detention barracks by assaulting white inmates and forcing authorities to withdraw them; similar incidents were reported from the Da Nang brig. The commandant was exceedingly pessimistic and candid about the utility of confinement at LBJ: he opined that it was inconceivable that anyone should be "rehabilitated" there and that the only benefits of confinement were that 1) it got the defendant out of his commanding officer's hair, and 2) it facilitated the process of ad-

¹⁰⁴ The command was determined not to enlarge the stockade.

¹⁰⁵ The lieutenant colonel and his principal staff officers were black men.

ministratively discharging such men.¹⁰⁶

For the special court-martial judge contemplating a sentence to confinement, the lieutenant colonel's views were extremely important. But for the occasional bad conduct discharge case, the special court-martial judge must operate on the premise that the defendant will remain part of the military community and will be required to perform military duty in the future. This factor immediately distinguishes special court-martial sentencing from that in general court-martial where the great majority are sentenced to punitive discharges. For the special court-martial the question most pertinent to confinement is: will stockade time improve the defendant's capacity to live properly within the military community or will it detract? In Viet Nam, the realities of the stockade situation and the commandant's views suggested the latter. For a limited number of defendants, there is validity in the snake pit theory of incarceration; the worse conditions are in jail, the more an imprisoned soldier will be motivated to lawful conduct in the future in order to avoid a return to those conditions. But in those cases in

which the defendant was serving with a unit assigned to combat duty, even the comparative safety and minimal amenities of the stockade were *physically* preferable to the risks and rigors of ordinary life in the unit.¹⁰⁷ Finally, there are occasions in which confinement seems a proper response to a particularly obstructive defendant simply because it removes him from the community. In military society, particularly in the combat situation, one soldier—who, for example, refuses to perform duty—can become destructive of the morale and effectiveness of others; and because of the ordinary demands of the war, resources cannot be diverted to provide constant supervision for such a person within his unit. Though ostensibly the offense may be minor, there is no practical alternative to removing the offender from the military community. All of these factors peculiar to Viet Nam, and many others, required careful consideration by the sentencing judge, but the irony of such work was that judges' laboriously conceived decisions to incarcerate were systematically eviscerated.

Significant in sentencing—and on the merits as well—was the

¹⁰⁶ At the time of trial, the judge and jurors have no information concerning any anticipated administrative discharge of the defendant.

¹⁰⁷ Thirty of my trials involved refusal of orders to participate in combat operations or movements. Short of these direct refusals, my cases did not disclose any defendants who engaged in other misconduct for the specific purpose of being incarcerated and thus avoiding combat duty.

military grade and seniority of the defendant. Presently in the Army, most non-commissioned officers—in the grades of sergeant (E-5), staff sergeant (E-6), sergeant first class (E-7), master sergeant or first sergeant (E-8) and sergeant major (E-9)—are serving beyond a first enlistment or term of induction; those in the grade of staff sergeant or beyond are almost certainly Army careerists—“lifers” in the vernacular—and contemplating a minimum 20 years of active duty to qualify for military retirement pay.¹⁰⁸ Twenty-six such non-commissioned officers, two warrant officers and one second lieutenant were tried in my court, and their trials reflected distinctive patterns in findings and sentencing. Eleven of the 29—38 percent—were found not guilty; this is more than twice the overall acquittal rate in my

court.¹⁰⁹ Almost 25 percent of these senior defendants chose to be tried by jury, three times the overall jury trial rate. Sentencing in these cases suggested important factors not present in the trials of lower ranking enlisted men who were almost sure to leave the military. Almost without exception, these senior men had no prior court convictions—otherwise they would be ineligible for their senior grade, and their instant convictions were almost certain to hamper, if not make impossible, any further advance in grade.¹¹⁰ For all, of course, military salary is graduated by grade, and any reduction of salary in consequence of loss of grade is in addition to financial penalties the court-martial may also adjudge. Since retirement pay is generally calculated on grade at the time of retirement,¹¹¹ a court-martial sen-

¹⁰⁸ See, Dept. of Army Pamphlet 608-2, at 104-107, June 1966.

¹⁰⁹ The comparatively high acquittal rate may, as in the case of homicide trials, have followed from an administrative reluctance in Army commanders to *nolle prosequi* defective prosecutions against senior personnel and a preference for judicial discharge of the allegations.

¹¹⁰ Promotions in grade, of course, depend upon a “clean” record. Moreover, a career non-commissioned officer must periodically reenlist for their next term of service; disciplinary proceedings in a soldier’s record can provoke an administrative decision to refuse the man reenlistment. Recent personnel policies have enhanced these considerations. Now a career enlisted man must be awarded promotions in rank within certain time limitations or be ineligible for reenlistment. *Up Or Out Policy Goes For All EM*, Army Times, 23 December 1970, at 1, col. 5. Any court adjudged reduction in grade not only sets a man back on this mandatory schedule, but also makes it very unlikely that he can subsequently be promoted to the level required to sustain his enlistment.

¹¹¹ N. 108, *supra*.

tence to reduction can cause a substantial loss of retirement pension.¹¹² Non-commissioned officers are older men and are usually supporting a family. Typically these defendants bear a chest load of ribbons and a long history of distinguished service. Thus understandably, while reduction in grade and confinement at hard labor—which as a matter of law in the Army causes reduction to the lowest enlisted grade whether or not reduction is specifically adjudged in court¹¹³—may be customary in sentencing low ranking soldiers, such penalties give great pause when non-commissioned officers are to be sentenced. Of the seven senior ranking defendants tried by jury in my court, three were acquitted; the jury sentenced two defendants, *inter alia*, to be reduced one grade and two more to only temporary forfeiture of pay; none were sentenced to confinement or reduction to the lowest grade. The 22 senior defendants tried without jury did less well; seven were acquitted; five were “busted” to E-1 and sentenced to confinement; two were reduced two grades and three

were reduced one grade; three others were sentenced to only forfeitures. A comparison of the results of those 29 non-commissioned officer and officer trials with the 290 cases in my court involving lower ranking enlisted men indicates that the former were acquitted in 38 percent of their trials, the latter in 17 percent; 65 percent of the lower ranking defendants were sentenced to confinement, but only 17 percent of the others; 27 percent of the non-commissioned officer defendants were sentenced to some reduction in rank without confinement, but this happened in only 13 percent of the other trials; finally, 17 percent of the non-commissioned officers but only 3 percent of the other defendants were penalized only with brief forfeitures of pay. These differences cannot be distinguished on an argument that the offenses committed by the two groups were substantially different; they were not. Though some prosecution counsel argued in court that a defendant's senior rank and leadership position made his delicts more blameworthy than similar offenses by lower

¹¹² A one grade reduction from staff sergeant (E-6) to sergeant (E-5)—based on projected mortality rates, current salary levels, and retirement after 20 years' service—causes a lifetime loss of \$16,700 in retirement pay. Such losses are increased if the soldier has more than 20 years of active duty service, is reduced more than one grade, or is reduced from a higher enlisted grade. Army Times, 21 April 1971, (Retirement Supplement) at 13R, col. 1.

¹¹³ 10 U.S.C. § 858a (1964).

ranking soldiers,¹¹⁴ apparently it was seldom believed. Short of innocence, the best defense appeared to be a wide set of stripes and rockers.

Perhaps the most instructive aspect of sentencing practice were the penalties returned in jury trials. Though the jury option was undoubtedly exercised in part on a belief in the jurors' comparative lenity and is thus an incomplete reflection of jury sentiment in all circumstances, nevertheless the persistent mildness of jury sentences was surprising. The first jury sentence returned in my court was in the case of a young soldier convicted on ten specifications of negligent homicide; the evidence revealed that in driving a truck load of mamasans to their village after a day of work on an American base, the defendant collided with a train thereby killing nine women and an American guard on the truck and unhorsing perhaps the only rolling stock of the Vietnamese National Railway. In the penalty trial there was a stale prior conviction which the defense eclipsed with a good quantity of character evidence. The jury reduced the defendant, a pri-

vate first class, to the lowest grade, extracted the maximum financial penalty, but did not sentence him to confinement. As the year passed, this sentence proved not to be an atypical jury result. Some say that the criminal law, and particularly the sentence, is society's judgment as to who is safe to have on the streets. If there is some truth in this, then the jury sentence—in spite of its many obvious limitations¹¹⁵—deserves attention and, to some extent, emulation. This was particularly so in Viet Nam because most special court-martial juries were composed of younger officers in command positions who were themselves responsible for maintaining discipline and administering rudimentary military justice procedures within their units. Special court-martial judges took some gentle sniping from all levels of command throughout the year on the subject of sentencing: the judges' sentences were too lenient. The critics evidentially assumed that jurors would do otherwise; I doubt that. Nothing was more certain than the demise of the legendary special court-mar-

¹¹⁴ There is some legal support for the argument the offender's military grade increases the seriousness of his transgressions—at least with regard to the enlisted man-officer dichotomy. Though in a court of proper jurisdiction enlisted men may be punitively discharged only for more aggravated offenses, officers may be punitively dismissed for commission of any offense proscribed by law. MCM 1969 (R), paras. 126*d* and *e*, 127.

¹¹⁵ Senator Bayh's proposed changes in the Uniform Code of Military Justice would eliminate the court-martial jury from sentencing procedure. S. 1127, 92d Cong., 1st Sess., §§ 826, 851 and 857 (1971).

tial jury with its automatic maximum sentence—"6 and 6." R.I.P.

* * *

While standing with me at a chopper pad in Viet Nam waiting for a flight to somewhere, a "regular" told me—in jest, I presumed—that the V.C. never shot military lawyers for the reason that they were more helpful alive than dead. The thought was comforting—in a way. That commentator was alarmed by the visible infusion of lawyers into the business of the military. He misunderstood the *zeitgeist*. From an Olympian prospect, the events of 1969-70 in Viet Nam special courts-martial are far more extraordinary than these pages of statistics and minutiae might suggest. One might, with reason, have assumed that the exigencies of the military campaign in Asia would produce there a more summary treatment of the military legal niceties. But incredibly, even in the difficult circumstances

of an on-going war and its super-eminent demands, military criminal law was extending and elaborating its guarantee of individual rights and protections—some apparently in excess of constitutional requirements.¹¹⁶ The misdemeanor courts were infused with legally trained counsel and judge, and staff legal counsel became increasingly available to the lower echelons of military command and administration. This professionalization palpably increased the actual and ostensible integrity of the military legal and administrative processes. And the fact and appearance of professionalism and integrity in the military criminal process has never been more important than at present as national policy seeks to present the military as an attractive career in public service. The criminal law reforms of 1968, executed so dramatically during my year in Asia, should contribute to that purpose.

¹¹⁶ See, *Baldwin v. New York*, 399 U.S. 66 (1970); Order Prescribing Rules Of Procedure For The Trial Of Minor Offenses Before Magistrates, 8 Cr.L. 3091 (U.S., 27 January 1971).

APPENDIX A

Schedule of specifications tried in the special courts-martial cases of Dennis R. Hunt, 17th Army Judicial Circuit, August 1969—July 1970.

10 U.S.C.	Article	Description	Number
§ 880	Art. 80	Attempts	4
§ 885	Art. 85	Desertion	1
§ 886	Art. 86	AWOL	165
§ 887	Art. 87	Missing movement	1
§ 889	Art. 89	Disrespect toward superior commissioned officer	30
§ 890	Art. 90	(1) Assaulting superior commissioned officer who is in the execution of his office	17
		(2) Disobeying superior commissioned officer	59
§ 891	Art. 91	(1) Assaulting non-commissioned officer who is in the execution of his office	13
		(2) Disobeying non-commissioned officer	50
		(3) Disrespect toward a non-commissioned officer who is in the execution of his office	15
§ 892	Art. 92	(1) Violating general regulation	106
		(2) Failing to obey a personal order	7
		(3) Dereliction of duty	24
§ 895	Art. 95	Resisting apprehension, breaking arrest, escape	13
§ 899	Art. 99	Misbehavior before the enemy by endangering the safety of the unit	1
§ 907	Art. 107	Making false official statement	21

§ 908	Art. 108	Loss, damage, destruction, or wrongful disposition of military property of the United States	4
§ 911	Art. 111	Drunken or reckless driving	1
§ 912	Art. 112	Drunk on duty	4
§ 913	Art. 113	Misbehavior of sentinel	17
§ 915	Art. 115	Feigning illness or inflicting self-injury	2
§ 916	Art. 116	Riot or breach of peace	1
§ 917	Art. 117	Provoking speeches or gestures	6
§ 919	Art. 119	Manslaughter by culpable negligence	2
§ 121	Art. 121	(1) Larceny	20
		(2) Wrongful appropriation	12
§ 923a	Art. 123a	Making, drawing, uttering bad check	8
§ 928	Art. 128	Assault	5
		(2) Assault and battery	16
		(3) Assaulting commissioned officer who is not in the execution of his office	2
		(4) Assaulting non-commissioned officer who is not in the execution of his office	9
		(5) Assaulting military policeman who is in execution of his office	9
		(6) Assault with a dangerous weapon	43
		(7) Intentionally inflicting grievous bodily harm	2
§ 930	Art. 130	Housebreaking	2
§ 934	Art. 134	(1) Indecent assault	1
		(2) Bribery	3
		(3) Disorderly conduct	6

(4) Possession, use or sale of habit forming drug	6
(5) Possession, use or sale of marijuana	69
(6) Possession, use or sale of a "dangerous drug"	2
(7) Defrauding of services	1
(8) Drunkenness	5
(9) Drunk and disorderly	2
(10) Possession of liquor	1
(11) Possessing, using, making false identification, pass, order, credentials	12
(12) Wrongful discharge of fire-arm	16
(13) Fleeing scene of accident	4
(14) Negligent homicide	19
(15) Theft of mail	1
(16) Pandering	2
(17) Receiving stolen property	1
(18) Breaking restriction	15
(19) Altering public record	1
(20) Uttering threats	50
(21) Improper uniform	5
(22) Unlawful entry	1
(23) Carrying concealed weapon	7

APPENDIX B

Schedule of specifications tried in the special courts-martial cases of John F. Naughton, 17th Army Judicial Circuit, Viet Nam, August 1969—December 1969.

10 U.S.C.	Article	Description	Number
§ 881	Art. 81	Conspiracy	1
§ 886	Art. 86	AWOL	40
§ 889	Art. 89	Disrespect toward superior commissioned officer	10
§ 890	Art. 90	(1) Assaulting superior commissioned officer who is in the execution of his office	2
		(2) Disobeying superior commissioned officer	31
§ 891	Art. 91	(1) Assaulting non-commissioned officer who is in the execution of his office	1
		(2) Disobeying non-commissioned officer	12
		(3) Disrespect toward a non-commissioned officer who is in the execution of his office	1
§ 892	Art. 92	Failure to obey regulations, orders	32
§ 895	Art. 95	Resisting apprehension, breaking arrest, escape	1
§ 907	Art. 107	Making false official statement	8
§ 908	Art. 108	Loss, damage, destruction, or wrongful disposition of military property of the United States	1
§ 911	Art. 111	Drunken or reckless driving	1
§ 912	Art. 112	Drunk on duty	1
§ 913	Art. 113	Misbehavior of sentinel	9

§ 916	Art. 116	Riot or breach of peace	1
§ 917	Art. 117	Provoking speeches or gestures	1
§ 919	Art. 119	Manslaughter by culpable negligence	2
§ 921	Art. 121	Larceny and wrongful appropriation	7
§ 928	Art. 128	Assault, battery, aggravated assaults	30
§ 934	Art. 134	(1) Disorderly conduct	3
		(2) Possession, use or sale of habit forming drug	4
		(3) Possession, use or sale of marijuana	43
		(4) Drunk and disorderly	2
		(5) Possessing, using, making false identification, pass, order, credentials	2
		(6) Wrongful discharge of firearm	2
		(7) Fleeing scene of accident	1
		(8) Negligent homicide	4
		(9) Impersonating non-commissioned officer	1
		(10) Use of indecent or obscene language	1
		(11) Obstructing justice	1
		(12) Breaking restriction	8
		(13) Uttering threats	9
		(14) Improper uniform	3

APPENDIX C

Schedule of specifications tried in the special courts-martial cases of John W. Hanft, 14th Army Judicial Circuit, Nurnburg, Germany, August 1969—February 1970.

10 U.S.C.	Article	Description	Number
§ 878	Art. 78	Accessory after the fact	2
§ 881	Art. 81	Conspiracy	3
§ 886	Art. 86	AWOL	65
§ 889	Art. 89	Disrespect toward superior commissioned officer	1
§ 890	Art. 90	(1) Assaulting superior commissioned officer who is in the execution of his office	2
		(2) Disobeying superior commissioned officer	13
§ 891	Art. 91	(1) Assaulting non-commissioned officer who is in the execution of his office	3
		(2) Disobeying non-commissioned officer	10
		(3) Disrespect toward a non-commissioned officer who is in the execution of his office	9
§ 892	Art. 92	(1) Violating general regulation	11
		(2) Failing to obey a personal order	9
		(3) Dereliction of duty	1
§ 895	Art. 95	Resisting apprehension, breaking arrest, escape	7
§ 908	Art. 108	Loss, damage, destruction, or wrongful disposition of military property of the United States	3
§ 909	Art. 109	Destruction or damage of private property	5

§ 911	Art. 111	Drunken or reckless driving	2
§ 912	Art. 112	Drunk on duty	3
§ 913	Art. 113	Misbehavior of sentinel	1
§ 916	Art. 116	Riot or breach of peace	2
§ 919	Art. 119	Manslaughter by culpable negligence	1
§ 921	Art. 121	(1) Larceny	12
		(2) Wrongful appropriation	5
§ 923a	Art. 123a	Making, drawing, uttering bad check	18
§ 928	Art. 128	(1) Assault	2
		(2) Assault and battery	9
		(3) Assault with a dangerous weapon or intentionally inflicting grievous bodily harm	10
		(4) Assault on a child under 16	1
§ 930	Art. 130	Housebreaking	4
§ 934	Art. 134	(1) Assault with intent to commit sodomy	1
		(2) Possession, use or sale of marijuana	9
		(3) Drunkenness	1
		(4) Drunk and disorderly	4
		(5) Possessing, using, making false identification, pass, order, credentials	2
		(6) Fleeing scene of accident	3
		(7) Negligent homicide	2
		(8) Concealing stolen property	3
		(9) Breaking restriction	11
		(10) Uttering threats	4
		(11) Unlawful entry	1
		(12) Carrying concealed weapon	1

In Memoriam

Since the last issue of the Journal the Association has been advised of the death of the following members:

Colonel Andrew B. Beveridge, USAFR
College Heights Estates, Maryland

Brigadier General Ralph G. Boyd, USAR-Ret.
Boston, Massachusetts

Lieutenant Colonel Donald C. Dickson, Jr., USAF-Ret.
Shreveport, Louisiana

Colonel John S. Dwinell, USA-Ret., Brooklyn, New York

Colonel Samuel R. Feller, USAR-Ret., New York City, N.Y.

Colonel Archibald King, USA-Ret., Washington, D.C.

Major Niles G. Peterson, USAF, on active duty, Far East

Major Calhoun W. J. Phelps, AUS-Hon.-Ret., Princeton, Illinois

Lieutenant Colonel Wallace C. Schinoski, USAR-Ret.
Ludlow, Vermont

Lieutenant Colonel Beverly S. Simms, USAR-Ret.
Washington, D.C.

Captain Michael I. Spak, USA, on active duty, Europe

Major Peter L. Wentz, AUS-Hon.-Ret., Chicago, Illinois

Colonel Milton Zacharias, USAF-Ret., Wichita, Kansas

The members of the Judge Advocates Association profoundly mourn the passing of their fellow members and extend to their surviving families, relative and friends, deepest sympathy.



General George S. Prugh

PRUGH BECOMES TJAG—ARMY

George S. Prugh was named The Judge Advocate General of the Army in the grade of Major General on 1 July 1971.

General Prugh, a native of Virginia, has been a resident of California most of his 52 years. He graduated from the University of California at Berkeley in 1941 and received his law degree at Hastings College of Law, University of California in 1948. His military career began in 1939 when he enlisted in the California National Guard. He was commissioned Second Lieutenant, Coast Artillery Corps through ROTC at Berkeley in 1942 while a law student and entered upon active duty in July of that year. After a number of assignments as battery and battalion officer in coast and anti-aircraft artillery state-side and in New Guinea and the Philippines, he was separated from active duty as a Major in 1946 and resumed his law studies. In 1948, he returned to duty as a legal officer. On his admission to the California Bar, he was transferred to The Judge Advocate General's Corps.

General Prugh has served successively as Assistant Judge Advocate, Sixth Army; in the Claims

and Litigation Division, OTJAG; in the Military Justice Division, OTJAG; as Assistant Post SJA and as SJA in Germany; as a member of the Board of Review, OTJAG; as Deputy SJA, Eighth Army, Korea; Deputy SJA, Sixth Army, San Francisco; Chief Career Management Division, OTJAG; Executive Officer, OTJAG; Staff Judge Advocate, Saigon; Legal Advisor, USEUCOM; and as Judge Advocate, USAREUR and Seventh Army. He is a graduate of the U.S. Army Command and General Staff College and of the U.S. Army War College.

Among his many decorations are the Distinguished Service Medal, the Legion of Merit with Oak Leaf Cluster and the Air Medal. General Prugh is author of many published articles, has been a teacher of international law and holds membership in many legal and military societies, including the Judge Advocates Association.

General and Mrs. Prugh maintain permanent residence at Piedmont, California, and during the current military assignment they reside at Alexandria, Virginia. General and Mrs. Prugh have two adult daughters, both married.

STATE MILITARY LEGISLATION

By William Lawrence Shaw *

I. INTRODUCTION

Since the cessation of hostilities in 1945 as World War II ended, there has been an increasing interest at the state capitol level in the broad subject of State Military Legislation, including provision for veterans' benefits paid by a state to a service man or to the widow or orphans of a deceased serviceman who entered federal military service from the particular state. In this article, we shall briefly review the growth or evolution of state military law from the mid-nineteenth century until the present time. The impact of the present conflict in Vietnam will be considered insofar as one or more states may have taken cognizance of the plight of prisoners of war (POW) and of men missing in action (MIA) as affecting their wives and children within a state. Frequent reference will be made to California legislation, not in the sense that California statutes are necessarily model in nature, but,

rather, as showing legislative efforts to meet special problems.

II. THE EVOLUTION OF MILITARY LEGISLATION IN CALIFORNIA

The American Civil War, 1861-1865, greatly influenced the growth of payment of benefits extended by the State of California to California servicemen. During the years 1861-1865, approximately 16,000 soldiers were recruited for the Union Army from California; an estimated 3,000 volunteers entered service with the Confederate forces.¹ Relatively few of the men federally-recruited had active service on eastern battlefields as the volunteers were retained in the West for strenuous field service against savage Indians, including the Apaches, to keep the mail routes open, protect the telegraph lines, and serve as a holding force in California to prevent armed incursions north from Mexico where a civil war raged as a result of invasion by Napoleon III and the

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¹ State Dept. of Vets. Affairs (Calif.) v. 19, #1, Jan, 1963, pp. 6-7, (Shaw) "Out of the Civil War, The Growth of Benefits for the California Serviceman".

placement of a puppet emperor upon a throne in Mexico.²

California was one of the first states to extend financial benefits to soldiers and sailors enlisted from the State. All recruits were volunteers as the federal Enrollment Act of March 3, 1863³ was never enforced in California.

An example of intangible expression for the GI of that day may be found in Legislative Concurrent Resolution #45, approved May 12, 1862,⁴ extending "warmest thanks" to the officers, soldiers, and sailors of California for their "brilliant victories recently won by their valor and skill." This is effusive rather than factual.

A more tangible form of veterans' benefits is to be noted in a statute approved April 27, 1863, which allowed to California Volunteers from the time of their enlistment to the time of their discharge, the sum of \$5.00 monthly more than was paid for their federal service.⁵ In order to fund this bounty, \$600,000. in state bonds were issued with interest at 7%. A tax of two cents in 1863 and four cents per hundred dol-

lars thereafter was levied on taxable property in the State to meet expenses. The additional monthly pay was tendered to the soldier at the time of his discharge and was a form of *terminal pay*.

A law dated April 4, 1864, allowed a bounty of \$160. to each man enlisting for three years. Of this amount, the sum of \$40. was paid at the time of enlistment, and thereafter an amount of \$20. was payable at the end of each successive six months. In case of death or honorable discharge from the service, the full amount of the bounty was paid either to the soldier or to his legal heirs. To a veteran reenlisting, a further amount of \$140. was paid by way of additional bounty.⁶

An enlisted married man was first enabled to make an *allotment to his family* to support his dependents during his absence on military duty, in a statute of March 15, 1864.⁷ When a serviceman died from a wound or from a service-contracted disability or disease, any amounts to which he was entitled could be paid to his heirs. The provision for *depend-*

² "The Impact of Napoleon III upon the Pacific Coast", *Pacific Historian*, Feb. & May 1963: "The Empress Eugenie and the War in Mexico, 1861-1867", *Pacific Historian*, Feb. & May 1964: "McDougall of California", *Calif. Hist. Society Quarterly*, June 1964, v. 43.

³ 12 Stat. 731, effective March 3, 1863.

⁴ Calif. Stats. 1862, p. 613, (hereinafter Stats.)

⁵ Stats. 1863, ch. 414, pp. 662-66.

⁶ Stats. 1864, ch. 442, pps. 486-91.

⁷ Stats. 1864, ch. 177, p. 172.

ency allotments was most beneficial, and has come down to us in the present day in legislation by Congress.

Indicative of the "hard money" controversy which disturbed financial circles of the East and West, the legislature adopted a resolution on March 10, 1863, memorializing Congress to pay Army and Navy personnel "serving west of the Rocky Mountains on the Pacific Coast", in gold and silver currency.⁸ Perhaps doubtful of the federal ability to meet such a restriction, the resolution continued that gold and silver should be used only if the same had been paid in as revenue from the Pacific area.

California pioneered in the *absent soldiers' vote*, now popularly known as an absent voter's ballot. An Act of April 25, 1863⁹ sought to allow soldiers to vote for candidates for public office. Election returns were to be reported to the Secretary of State. As a consequence, a majority of white servicemen voted in the 1863 elections. However, the statute was declared unconstitutional in 1864¹⁰ as the

California Supreme Court concluded that the Legislature could not authorize an elector to vote outside of a county where he maintained legal residence. No exception was to be recognized for the military.

Another statute was adopted on April 4, 1864 and again provided for soldiers' absent voting.¹¹ Lists of electors were to be prepared by the Adjutant General of California for the Secretary of State. This statute, too, was likewise overturned in 1866.¹² The Supreme Court held that qualified voters could vote only in the county or district of actual residence and could not be authorized to vote at a place away from home where they might be performing ordered military duty. Before the court case was decided in 1866, however, most of the white servicemen voted in the elections of 1864 and 1865.

Determined to allow men in the military service to vote, the Legislature again countenanced absent voting in a statute enacted in 1872,¹³ and amended in 1899¹⁴ and in 1901.¹⁵ Although the absent

⁸ Stats. 1863, p. 794.

⁹ Stats. 1863, ch. 355, p. 550.

¹⁰ *Bourland vs Hildreth*, 26 Cal. 161 (1864).

¹¹ Stats. 1864, ch. 383, pp. 432-34.

¹² *Day vs Jones*, 31 Cal. 261 (1866).

¹³ Stats. 1872, ch. 14, pars. 1357-65, March 12, 1872.

¹⁴ Stats. 1899, p. 48.

¹⁵ Stats. 1901, ch. 14, p. 606.

voters statute was repealed in 1911,¹⁶ a similar voters' law was approved in 1923.¹⁷ A serviceman generally may vote now in any California Primary or General election, if he is otherwise qualified.

Veterans preferential hiring became an actuality in 1891 when a state statute allowed preference in public employment to honorably discharged Union veterans.¹⁸ This was popularly known as the *Veterans Employment Law*.

A state act of 1889¹⁹ provided for payment of the sum \$50. to assist in the burial expense of indigent ex-soldiers, sailors and marines.

III. PRESENT DAY VETERANS' BENEFITS IN CALIFORNIA.

In general, veterans' benefits are administered in California through the Department of Veterans' Affairs. The Department is headed by a Director appointed by the Governor. Veterans' matters are administered in accord with policies determined by Cali-

ifornia Veterans Board which is composed of four divisions which are (1) Administration, (2) Farm and Home Purchases, (3) Veterans Home and (4) Veterans Services, including educational assistance.²⁰

Claims Assistance:

The Division of Veterans Services provides counseling and representation on claims related to military service. Division Offices are located in northern California and in southern California.

Education:

Benefits are allowed to widows of veterans who died from wartime service-connected disabilities or in peacetime since September 16, 1940: to wives of veterans totally disabled from service-connected factors; and to children of veterans who died or were totally disabled from service-connected causes. A grant of education assistance rests in the determination of the agency. Applicants must be native or have five years residence in California immediate-

¹⁶ Stats. 1911, p. 1393.

¹⁷ Stats. 1923, ch. 14, p. 587, May 31, 1923.

¹⁸ Stats. 1891, ch. 212, March 31, 1891.

¹⁹ Stats. 1889, ch. 161, March 15, 1889.

²⁰ Stats. 1st Ex. Sess. 1946, ch. 114, #2, p. 149. The Military and Veterans Code (M & VC) contains statutory provisions relating to veterans. The factual data set forth in the context of this writing are extracted from a "Fact Sheet on Calif. State Benefits for Vets," released in January 1971 by the Div. of Vet. Services, Sacramento. In the interest of economy of space, statutory and regulations references are eliminated and the various benefits are summarized.

ly preceding initial application. Deceased or disabled veterans are not required to be residents or natives of this state. To be applicable, federal benefits must be exhausted before state entitlement can be granted.

Cal-Vet Loans:

The Division of Farm Purchases makes low interest loans to qualified veterans in maximum amounts of \$20,000. for homes and \$80,000. for farms. The loans are financed through California Veterans Bonds. Loans must be made within 20 days of discharge or November 13, whichever is later. The veterans must be natives or residents of the state at the time of entering service during the periods: April 6, 1917 through November 11, 1918; December 7, 1941 to December 31, 1946; June 27, 1950 to January 31, 1955; August 5, 1964 to a date not yet established. Special consideration is given to wounded and disabled veterans. Income properties located outside California disqualify an applicant.

Veterans Home and Hospital:

The State maintains a veterans home at Yountville in Napa County about 40 miles north of San Francisco. Veterans must be residents of California for at least five years, immediately prior to application, and have honorable wartime service in the Armed Forces of the United States to be eligible. They must have a temporary or permanent disability to the extent

that they are unable to pursue a gainful occupation, and must be financially unable to provide for the hospitalization or domiciliary care. A section of the Home is operated for women veterans.

Services to Veterans:

County Veteran Service Officers have been appointed by the County Supervisors in all but three of the state's counties. The Department pays a substantial portion of the cost of the offices usually located in or near county court houses. The Division of Veterans Services maintains liaison with these county offices.

Veterans Preference in State Employment:

Veterans and widows of veterans receive from 10 to 15 points preference on examinations for state civil service positions, depending on the type of examination and the degree of disability, if any. Veterans also have retention rights on employment lists, are entitled to civil service credit for applicable (comparable) military experience, receive preference over nonveterans in policeman and watchman examinations, may be granted educational leaves of absence, have the right to complete examinations interrupted by military service, and gain seniority credits.

State Employment Representatives:

Veterans Employment Representatives are stationed at all lo-

cal offices of the State Department of Human Resources Development (which administers the payment of unemployment compensation and the State Employment Offices) to assist veterans in obtaining employment.

Tax Exemptions:

Certain property tax exemptions are extended to California veterans. Specific information should be sought from local County Tax Assessors Offices usually at the county court house. Motor vehicle fees are waived for any one motor vehicle owned by a veteran who has loss of both legs or is permanently blind from injury or disease resulting from active service in the military.

Hunting Licenses:

Free hunting licenses and tags and fishing licenses are issued to veterans with service connected disabilities of 70% or more incurred during wartime. Further information may be obtained from the State Department of Fish and Game.

Burial:

An allowance of up to \$250. may be provided by a county so that the burial of any honorably discharged veteran or widow will not be in a pauper's field. Maintenance of graves and the setting of headstones constitute a county charge. County burial allowance

is not made if a federal burial allowance is available.

Vital Statistics:

No charge is made by any county recorder for the recording of an honorable discharge, certificate of service, report or notice of separation and the issuance of a certified copy thereof. No charge is made by any state or local agency for furnishing a certified copy of a marriage, death or birth certificate or divorce decree or deed of trust or mortgage or property assessment and for the making of any necessary search in connection with such instruments when they are to be used in presenting a veterans claim for federal or state benefits.

Guardianship:

The State has adopted the Uniform Veterans Guardianship Act²¹ which provides for the *appointment by the courts of a guardian or conservator* to administer the property of an incompetent veteran, or for the minor child of a veteran in order that benefits may be received from the federal Veterans Administration on behalf of the ward. In the instance of an incompetent veteran committed to a state hospital, the State Department of Mental Hygiene acts as guardian if no other interested person seeks appointment.

²¹ Sec. 1650, Probate Code, 9 Un. Laws Annotated: Stats. 1931, ch. 281, p. 684, as amended Stats. 1945, ch. 1398, p. 2606: see 23 So. Calif. L. R. 220 (1950) as to Calif. legislative changes in Un. Vets. Gdnsp. Act.

IV. PROBLEMS OF THE STATE NATIONAL GUARD.

1. *Exemption of a Guardsman from a Civil or Criminal Liability.*

Some states by statute have sought to grant a specific immunity to National Guardsmen for acts committed during the course of active ordered state service. However, any statute must be read in the light of the cases which interpret the statute for better or worse. A Michigan Act provided that the state military should "be privileged from prosecution by the civil authorities—for any acts—committed while on such service". This seemed and was probably intended to set forth a grant of individual immunity both civil and criminal. However, the Michigan Supreme Court withheld such an interpretation in *Bishop vs Vandercook*.²² The case arose in an action for damages to the plaintiff's auto which at night struck a log road-block placed across a highway by a detachment of Michigan National Guard in order to halt traffic at a search

point. Under the facts, the Monroe County Sheriff had besought aid from the Governor to stop the transport of liquor from wet to dry territory within the state. The area approaching the road-block was illuminated by flashing red lights. The plaintiff was a taxi driver who picked up a fare in a saloon, observed the fare hide an object in the tonneau of the vehicle, and then drove with dimmed lights at a speed of 50-60 miles per hour on the road. The plaintiff-driver saw the military guard, but did not stop, and the wreck ensued. A quantity of liquor was found in the wreckage. The Supreme Court affirmed a jury award of \$2,000. damages to the plaintiff and declared: "There is no such thing as military power, independent of the civil power." The acts of the defendants were characterized as "wilfull and wanton". The case illustrates the considerable difficulty often encountered by state troops in the performance of ordered state military duty, and discloses what amounts to a judicial avoidance of a statute of immunity.

An early instance of a *federal grant of immunity* arose under

²² 228 Mich. 299, 200 N. W. 278, 281 (1924). Some of the discussion in this article has previously been used by this writer in an article, "Tort Liability and National Guard Personnel", *Judge Advocate Journal*, June 1967. Compare the judicial reasoning in *Bishop vs Vandercook* with that of Mr. Justice Holmes expressed in *Moyer vs Peabody*, 212 U. S. 78, 85 (1909) to the effect that in time of crisis, the acts of the executive branch must supercede the reasoning of the judiciary.

the Enrollment Act of 1863,²³ the first federal conscription law in United States history. A provision in the act purported to relieve from liability, those who were involved in the commission of any act under the President's authority. The statute set a period of limitations of two years as to any proceeding arising in a seizure or a trespass because of the necessities of war.

In 1866, after hostilities had ended, a more comprehensive federal statute granted relief from any liability as to all acts performed under *orders of superior military authority*.²⁴ The validity of the two years' limitation upon the bringing of any action was sustained by the United States Supreme Court.²⁵

An instance of what was intended as an early comprehensive state statute of immunity to a National Guardsman was found in a New York Law of 1898.²⁶ The act proved in vital part:

"Members of the militia ordered in the active service of the state by any proper authority, shall not be liable civilly or criminally for any acts done by them while on duty."

A Louisiana statute which granted immunity to National Guard personnel for acts performed on active state duty, *if ordered by the Governor*, was valid, and the guardsman on active duty was declared immune from liability for any tortious acts.²⁷

Under an *interstate compact* of New York and New Jersey, the National Guard of each state was immune from any civil liability within or without either state arising out of *training maneuvers*.²⁸ Under the facts, the military driver of a military vehicle which was a part of a convoy of New Jersey National Guard moving to summer maneuvers at Camp Drum in New York, was immune

²³ Op. cit. supra, note 3, Act of 3 March 1863. As to federal conscription, consult "The Civil War Federal Conscription and Exemption System", *JAJ*, Feb. 1962; anent the Confederate draft which was the first national conscription statute in America, see "The Confederate Conscription and Exemption Acts", 6 *Am. Jour. Legal Hist.*, Oct. 1962, pp. 368-405. As to present day Selective Service, consult "Selective Service: A Source of Military Manpower" (Shaw) *Mil. L. Rev.*, July 1961, pp. 35-68.

²⁴ 14 Stat. 46, Act of May 11, 1866.

²⁵ *Mitchell vs Clark*, 110 U. S. 633 (1884).

²⁶ Laws N. Y. 1898, ch. 212, p. 514; Amended Laws 1953, ch. 420, effective 2 April 1953. The quoted section is that of the 1898 statute.

²⁷ *State vs Josephson*, 120 La. 433, 45 So. 381 (1908).

²⁸ *Dorr vs Gibson*, 145 N. Y. S. (2) 48, 208 Misc. 262 (1955).

from liability for injuries sustained by the occupants of a vehicle with which his military truck collided. The court upheld the compact entered into by the states and concerned with military aid in an emergency. The court saw complete immunity from any civil liability, not only for acts in the home state but also for those acts occurring without the state and while going to or returning from out-of-state service or duty.

In an unusual decision, it was held that although liability had been suspended or even avoided, liability would attach after the performance of duty had been completed. A commanding officer of National Guard units had been sent as an observer to where the Guard units were holding maneuvers. The observer was held liable for traffic violations on his return from maneuvers although a statute purported to relieve Guard personnel from all liability while engaged in the performance of duty.²⁹

A guardsman might become personally liable where he seemed to exceed or go beyond the clear limits of his authority.³⁰ Where a company commander imprisoned for several hours a member of his company, but, not apparently for a

military infraction, this constituted an actionable wrong by the company commander.³¹

The Rights of Peace Officers

A leading case is *State vs McPhail*.³² The Governor of Mississippi ordered the National Guard to enforce the law near Jackson, in an area known as the "Gold Coast" in Rankin County. Within the locality, numerous places openly violated the state's liquor or gambling laws. An officer of the National Guard used a search warrant to obtain evidence which led to the abatement of McPhail's premises as a common nuisance. The State Supreme Court upheld the action of the National Guard, and determined that the National Guardsman serving during a disorder had the right of a police officer. He was something more than a mere armed citizen at the scene of the disorders. The court did not give to the guardsman the exact status of a peace officer, but, rather, resolved that the guardsman on duty in an area of lawlessness had the *rights of a peace officer*. This was vital in the making of an arrest of an offender and safeguarded the guardsman later against any claim for liability or redress.

²⁹ *Cotton vs Iowa Mutual Liability Ins. Co.*, 363 Mo. 400, 251 S. W. (2) 246 (1952): *affd.* in 260 S. W. (2) 43 (1953).

³⁰ *Mallory vs Merritt*, 17 Conn. 178 (1845): *Darling vs Bowen*, 18 Vt. 148 (1838): *Nixon vs Reeves*, 65 Minn. 159, 67 N. W. 989 (1896).

³¹ *Nixon vs Reeves*, *Ibid.*

³² 181 Miss. 360, 180 So. 387 (1938).

It will be recalled that a peace officer may arrest without a warrant for (1) a felony committed in his presence, or (2) arrest a person whom he has probable cause to believe has committed a felony (even if in fact there was no offense actually committed or the accused did not, in fact, participate), or (3) for a misdemeanor committed in his presence, or (4) arrest a person threatening to commit an offense against the peace in his presence.³³

In *Bishop vs Vandercook*,³⁴ the Guard member was restricted to what could be done by a peace officer who was on the scene, and he was allowed no greater latitude. A decisive factor was that the *local situation was relatively calm*. There was no opposition as such to the Guard. It seems readily apparent that in a situation involving tumult and disorder, the Guardsman should while on duty be allowed all rights granted to a peace officer.

It is respectfully submitted by this writer that by early legislation within the state all National Guard on active duty should be granted the rights of peace officers and particularly in the matter of making arrests without warrant for felonies and misdemeanors, either actually or seemingly committed in or out of their presence. Thereafter, complete civil and criminal immunity should follow.

The Order of a Superior

A leading case is *Hurlihy vs Donahue*.³⁵ This was a case of the ordered destruction of liquor stocks in order to prevent their consumption by rioters. In 1914, the Governor of Montana declared Silver Bow County to be in a *state of insurrection*, and ordered state troops into the locality. A major in charge of the troops had set hours for liquor sales from 8:00 a. m. to 7:00 p. m. daily. Acting on the assumption that the plaintiff was violating the restrictions, the major directed two junior officers to remove and destroy the liquor. The State Supreme Court held that there should have been *notice to the plaintiff* and an opportunity to him to show that he was not in fact violating the restrictions. (This might be extremely time-consuming in a situation of tumult and disorder.) However, the court held that only the *superior officer, the major, was liable*, and the two junior officers were absolved as they could not refuse obedience to an order which seemed valid on its face, under the circumstances. In this case, the two guardsmen on the turbulent scene were allowed a greater authority than would be found in peace officers who cannot destroy property to prevent its misuse. The junior guardsmen were obeying orders which seemed

³³ 5 Am. Jur. (2) "Arrest", pp. 715-17.

³⁴ Op. cit. supra, note 22.

³⁵ 52 Mont. 601, 161 Pac. 604 (1916).

reasonable on their face as the curtailment of liquor should lead to control of a tumultuous situation.

In *Hurlihy*, above, the court stressed that the order of the superior was to be obeyed by his subordinates, and obedience to a seeming reasonable order was a defense to the guardsman who obeyed the order to destroy property. How much more realistic would be the application of a statute of civil and criminal immunity in favor of both the superior and the junior guardsmen.

In the matter of obedience to orders as a defense, a major case was *Moyer vs Peabody*.³⁶ Here, the United States Supreme Court upheld action by the Governor of Colorado (1) in declaring a county to be in a state of insurrection because of labor unrest, and (2) the calling out of the National Guard. The plaintiff had been taken into custody and held without charges for 75 days. This was a proceeding by Moyer against a former Governor and a former Adjutant General of the State and a captain of the Guard company. In a decision by Mr. Justice Holmes,

the court affirmed the action of the Governor and of the troops commanders. The court devoted discussion to the defense of reliance upon orders with regard to a civil suit brought after the local situation had improved and the Guard had been withdrawn.

In *Hyde vs Melvin*,³⁷ an organized militia officer could not rely upon the order of a superior to do what was clearly forbidden by state law. The junior officer could not muster his company, although so ordered, during an election time where a statute of New York forbade drill formations during an election. The circumstance that a superior issued such an order was no defense. On the other hand, to us in the late twentieth century a prohibition upon drill formations on an election day may seem frivolous! However, where an order was lawful on its face and did not contravene any known law, the subordinate could rely by way of defense on the order of his superior.³⁸

A Proposed Model State Statute

In what is regarded by this writer as model legislation, the

³⁶ 212 U. S. 78, 85 (1909): in the Colo. courts, 35 Colo. 154, 159, 85 Pac. 190 (1904). See "The Use of the National Guard During Tumults and Disasters", *JAJ*, April 1968. The situation in *Moyer* involved (1) the call of the Colorado National Guard for a period of several months, and, finally, (2) the use of the U. S. Army troops. The lengthy use of state troops points to the discussion, infra, in Point IV, 2, as to Additional Compensation to Guardsmen on Active State Duty. Consult "The Interrelationship of the U. S. Army and National Guard, 31 *Mil. L. R.* 36 (1966).

³⁷ 11 Johns. (N. Y.) 526 (1814).

³⁸ *Herlihy vs Donohue*, op. cit. supra, note 35.

State of Nevada has provided that no person "belonging to the military forces" is subject to arrest on civil process while going to, or remaining at, or returning from any place at which he may be required to attend for military duty.³⁹ Members of the active militia (National Guard) on active service are not liable civilly or criminally for any action in line of duty.⁴⁰ The *Attorney General of Nevada* is required to defend any suit or proceeding brought against any officer or soldier.⁴¹ If the proceeding is criminal, the Judge Advocate General or a judge advocate shall be designated by the Governor to defend such an officer or person.⁴² There is waiver of governmental immunity by the State and its agencies and political subdivisions. However, no action may be brought against an *employee* of a governmental unit (as distinct from the governmental unit) based upon his alleged act or omission.⁴³ An award of damages from a court, if granted against a governmental unit, may not exceed the sum of \$25,000. to any one claimant, nor may an award include any exemplary or punitive damages or al-

low any interest prior to judgment. The State and any political subdivision may *insure* against any liability or insure against the *expense of defending a claim* or insure any of its employees from claims of liability arising from an act or omission within the scope of their employment.⁴⁴

2. *Additional Compensation to Guardsmen on Active Duty.*

The proposal is made that additional compensation should be paid to National Guardsmen in the lower enlisted grades while they are performing on ordered State active service apart from training. The active service is that which may arise in time of tumult, disaster or emergency. The Governor in his discretion should be permitted to augment the compensation paid to the lower enlisted grades or to such of them or to the personnel within certain of them as he may determine in order to increase their compensation, for the benefit of their dependents, to approximate or equal civilian wage scales. The lower enlisted grades are regarded as Grades 1 through 4, inclusive, for Army Guard, and the Grades Airman

³⁹ Nevada Revised Statutes (hereinafter Nev RS) Sec. 412.725 (1965).

⁴⁰ Nev. RS, Sec. 412.740.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Nev. RS, Sec. 41.03.

⁴⁴ *Ibid.*

Basic through Airman 1st, inclusive, for the Air Guard.

The reason for this suggested amendment of state law is that military compensation for the lower four enlisted grades is considered below comparable civilian wage scales. An enlisted man in state active service is engaged 24 hours daily which usually includes arduous physical service. Generally, the enlisted personnel are separated from their homes and families leading to at least a partial disruption of home ties. The lower grades tend to be composed of men young in years who have not achieved such a position in the economic world that their savings, if any, will carry them through a period of sharply reduced income which may last for several weeks or indeed months. It is foreseeable that severe economic stress will involve the guardsman at home and become as to him a serious morale factor.

The present wage scale for a Private, Grade 1, is \$4.48-\$6.37. The compensation of Grade 1 is minimal. Even if the Private in Grade 1 receives the maximum in his class, this is probably insufficient to support his family or to maintain a normal standard of living. The proposed amendment would permit a Governor in his discretion to increase the compensation of the Grade 1 Private, for example, to a sum not to exceed \$9.00 daily as maximum. Allowances, if any, would be considered in determining the \$9.00 maximum. The augmented compensa-

tion would prevent any family dependents from suffering privations. Conceivably, the augmented compensation might be restricted to married men in the lower grades, and to single men who prove the support of such dependents as aged parents, minor brothers and sisters, minor children by a former marriage, etc.

The following amendment to state law is suggested:

Additional Compensation to Equalize Wage Standards: Whenever the National Guard is called for state active service at a time of tumult, disaster or emergency, the Governor, in his discretion, may augment the compensation paid to the four lower enlisted grades or to such of them or to such individuals within them as he may determine, in order to increase their compensation to more nearly approximate (equal) civilian wage scales. Any additional pay granted to an enlisted man shall not exceed the maximum of \$9.00 daily, including his normal pay and allowances. The lower enlisted grades are defined as Grades 1 through 4, incl., for Army Guard, and Grades Airman Basic Airman 1st, incl., for the Air Guard. Any augmented compensation is only for the period or time specified by the Governor and shall not be considered for retirement or pension purposes.

The State of Hawaii has allowed additional pay to National Guards-

men called into active state service.⁴⁵ The aggregate of pay and allowances shall not be less than an amount equal to eight times the hourly wage specified by statute. The statutory minimum wage is apparently \$1.60 hourly.⁴⁶ This amount \$12.80 seems excessive to this writer. A former Hawaii statute covered all enlisted grades, Private through Master Sergeant for both Army and Air, beginning at 50 cents daily for Private and moving to 70 cents daily for Master Sergeant.⁴⁷

3. *Military Leave for Public Employees.*

Section 395.1 of the California Military and Veterans Code (M & VC) provides as follows:⁴⁸

"Any public employee who is on temporary military leave of absence and who has been in the service of the public agency from which the leave is taken for a period of not less than one year immediately prior to the day on which any absence begins shall be entitled to re-

ceive his salary or compensation as such a public employee for the first 30 calendar days of any such absence. Pay for such purposes shall not exceed 30 days in any one fiscal year. - - -
(Emphasis added)

In *Gray vs Bolger*,⁴⁹ it was held that a leave of absence granted to a public employee in California covering a period of active military service, did not create a vacancy in his position of employment, but, merely suspended his occupancy of the position during his time of absence, and the employee returned with certain rights that he might assert on termination of his military service.

At the 1971 Regular Session of the California Legislature, Sec. 395.1, M & VC, above, has been rewritten into the Government Code from the M & VC without substantive change. The end result is that annually any public employee, state, city, county or district, who is an active reservist with any of the Armed Services—

⁴⁵ Ha. Laws Sec. 121-40: Laws 1967, ch. 196, pt. of #1: HRS #121-40, Am. L. 1969, ch. 15, #1(b) 1.

⁴⁶ Ha. Laws Sec. 387-2: Laws 1969, ch. 36, #3.

⁴⁷ Ha. Laws Sec. 353-47: Laws 1935, ch. 143, s. 1: RL 1945, s. 13072: Am. L. 1951, ch. 115, s. 1(4).

⁴⁸ Stats. 1951, ch. 1561, #2, p. 3556, effective July 17, 1951.

⁴⁹ 157 Ca. App. (2) 583, 321 Pac. (2) 485 (1958). Sec. 395.1, M & VC allows 30 days with pay to a public employee going on more or less extended active duty. Sec. 395.01, M & VC, allows 30 days with pay for temporary military duty, such as is performed by a reservist.

Navy, Army, Air Force, Marine Corps or Coast Guard—is entitled to 30 days annual leave with pay in order that he may perform the ordered military duty for training. The duty performed may be that of annual field encampment or a cruise or flight training. Additionally, reservists may attend under orders at a Service School provided that the annual 30 days is not exceeded. If the time extends beyond 30 days in a fiscal year, the public compensation is cut off at the end of 30 days but the employment is not disrupted.⁵⁰

A survey in 1965 conducted by personnel of the National Guard Bureau developed that all but one state allows military leave with pay to public employees ranging from 10 work days (as distinguished from calendar days) to, in effect, unlimited time of absence with pay. The national average was approximately 34-25 days annually with compensation.⁵¹

The enjoyment of military leave with pay is not an unmixed blessing. In California, since 1961, almost on a yearly basis, bills are introduced at the legislative level to restrict, abolish, curtail or reduce military leave with pay for

public employees. The usual argument is economy.

At the 1971 Regular Session, AB #359, introduced February 2, 1971,⁵² would have amended the M & VC to provide that allowance of military leave was "at the option of the employing public agency." A grant of military leave is mandatory in the present law. If the bill had been enacted, the end result would have been that any reservist would have been able to perform ordered temporary military duty, only if and when his public-agency employer determined to allow him to perform the military duty. It was foreseeable that time-off in the option of a public agency would seriously affect the ability of reservists to perform ordered duty with their reserve components and would have a prejudicial effect upon all of the reserve components. AB #359 was withdrawn in effect by the author of the bill.

In any state, it is imperative that the military statutes, codes or laws should be watched carefully during legislative sessions in order to prevent untoward changes in the law, under the guise of economy, and which

⁵⁰ Stats. 1971, ch. 446, approved and recorded with Secty. of State, Aug. 2, 1971. It is viewed by this writer as a set-back that provisions dealing with the state military were lifted from the M & VC and placed in the Government Code. This goes contrary to the accepted principle that a code, such as the M & VC, should be the depository of the statutory law dealing with the subject matter of the code.

⁵¹ "Military Leave Survey", NGB, 1965, as amended, prepared for the State of California Adjutant General.

⁵² Journal of Assembly, 1971 Reg. Sess., Feb. 2, 1971, p. 318.

might prejudice the reserve components of all the services, including the National Guard both Air and Army.

V. RECENT ITEMS OF SPECIFIC INTEREST FROM CALIFORNIA

1. *Assembly Joint Resolution #35 in 1971.*⁵³

AJR #35, as amended, was approved without a dissenting vote in each House of the California Legislature, effective July 26, 1971. The resolution memorializes Congress to adopt pending Congressional legislative bills designed to provide incentive pay for judge advocates and other legal officers on active duty with the armed forces. The final result is the State of California has officially endorsed the subject matter of providing incentive of special pay for military legal officers. The resolution recites that the retention rate of legal officers by the armed services is dangerously low and legal careers with the armed forces should be made more financially acceptable. Copies of the resolution, after adoption, have gone forward from the Chief Clerk of the Assembly to the President and the Vice-President of

the United States, the Speaker of the House of Representatives, the Chairmen of each of the Senate and the House Committees on Armed Services, the Secretary of Defense, and the respective Secretaries of the Army, Navy, and Air Force, and to the Executive Secretary of the Judge Advocates Association. In 1969, a similar resolution, namely, AJR #42⁵⁴ was adopted without dissenting vote in a legislature of 120 members, and called upon Congress to approve the then-pending Pirnie Bill, and achieved wide publicity as the first, formal, *official action by a State to advance the cause of incentive or special pay* for military lawyers. It is regarded as fitting that the State of California should officially take a stand in support of special pay for law officers as the State sends more men into the armed services than does any other state.

2. *AJR # 44 in 1969.*⁵⁵

Effective June 16, 1969, there was adopted in each House of the California Legislature, AJR #44 relating to the equalization of the compensation of retired members of the armed forces. The resolution recited that compensation for retirees is normally computed up-

⁵³ Stats. 1971, Res. ch. 104, effective July 26, 1971. The resolution was introduced by a distinguished attorney-legislator, Assemblyman Walter W. Powers of Sacramento at the behest of the No. Calif. Chapter, JAA.

⁵⁴ Stats. 1969, Res. ch. 200, pp. 3840-41, effective June 16, 1969. The Pirnie Bill was H. R. 4296 introduced by Congressman Alexander Pirnie of N. Y.

⁵⁵ Stats. 1969, Res. ch. 201, pp. 3841-42, effective June 16, 1969.

on active duty rates set out in Title 10, USC, and relatively few persons now retired entered the military service while that law was in effect. It is set forth that the Uniform Services Pay Act of 1963, PL 88-132, permanently changed Title 10 and operates to deny the benefits of that Act and the future active duty pay raises to many retirees and has substituted a less advantageous system of raises based upon cost of living. The resolution goes on that there were in 1969 seven standards of pay for persons who served in the same rank and for the same period of time and with the result that older retirees draw as much as 32.5% less than do younger colleagues and the final result is discriminatory. The resolution memorializes Congress to correct the situation.

*Assembly Bill #665 in 1971.*⁵⁶

Approved by the Governor and recorded by the Secretary of State

on July 30, 1971, AB #665 amends Section 986.1, M & VC, relating to the Veterans Farm and Home Purchase Act of 1943.⁵⁷ The bill provides that if a member of the armed forces from California is being held as a *POW* or has been designated as *MIA*, he shall be *considered to be a "veteran"* for the purposes of the statute, and *his wife may file an application* and be entitled to the same rights, privileges, and benefits, and may contract with Department of Veterans' Affairs as proved in the instance of a widow under the provisions of the act.

It is readily apparent that the effect of AB #665 is very advantageous to the wife and family of a *POW* or a serviceman *MIA* to become immediately eligible to obtain veterans benefits under the enabling statute.

The following table indicates the statistical scope, nation-wide, of the *POW-MIA* involvement:⁵⁸

⁵⁶ Stats. 1971, ch. 421, recorded July 30, 1971. A legislative bill, such as AB 665, requires approval by the *Governor* after passage through each House of the Legislature. A resolution does not require executive approval as it is an expression of legislative intent free of executive review.

⁵⁷ Stats. 1943, ch. 1046, #1, p. 2981, and as amended. With application to veterans of WW I, there was the Vets. Farm & Home Purchase Act of 1921: Stats. 1921, ch. 519, #3, p. 815 and as amended. The basic statute is constitutional, *Veterans Welfare Board vs Riley*, 188 Cal. 607, 206 Pac. 631 (1922): *Eisley vs Mohan*, 31 Cal. (2) 637, 192 Pac. (2) 5 (1948).

⁵⁸ Release, Dept. of Defense, Office of Dir. of *POW-MIA* Task Force, apparently 1 August 1971.

AMERICAN POW'S AND MIA IN
SOUTHEAST AISA:
(as of July 31, 1971)

By Country:	Missing	Captured	Total
In North Vietnam	407	378	785
In South Vietnam	497	82	579
In Laos	248	3	251
Totals	1,152	463	1,615

By Service:	Missing	Captured	Total
Army	393	62	455
Navy	109	143	252
Marine Corps	93	23	116
Air Force	557	235	792
Totals	1,152	463	1,615

4. *Assembly Bill #875 in 1971.*⁵⁹

AB #875, as amended, was approved by the Governor and recorded by the Secretary of State on August 2, 1971. Essentially, the bill amends, renumbers, re-groups and transfers to the Government Code from the M & VC existing provisions of law relating to military leave for state civil service employees, grants leaves for reserve duty to probationary employees with less than six months' service, makes standard the conditions for granting leaves, and establishes time limits for reinstatement after military leave. The bill does not curtail or reduce military leave but is a recodification. The State Personnel Board gained the introduction of the bill. It is believed beneficial

⁵⁹ Op. cit. supra, note 50. See discussion in this article #IV, (3), as to Military Leave for Public Employees.

⁶⁰ Stats. 1971, Res. ch. 27, filed with the Secretary of State March 4, 1971.

to have military law code sections reviewed at intervals of at least once in a decade in order to remove or overcome archaic matters from the scope of the law.

5. *Senate Joint Resolution #18 in 1971.*⁶⁰

SJR #18, following adoption, was filed with the Secretary of State on March 4, 1971. The resolution memorializes the President and Congress to take whatever diplomatic steps may be appropriate to urge the government of North Vietnam to comply with the Geneva Conventions with respect to the treatment of American men who are POWs in the Vietnam conflict. The resolution states in vital part:

"The American people cognizant that the prisoners are being held in conditions far less than humane, seek adequate food, housing, and medical treatment for the prisoners, as well as inspection by an organization such as the International Red Cross and constant exchange of mail between the prisoners and their families."

The resolution continues that the failure of the North Vietnam government to reveal the names of POWs imposes a cruel situation

on American families, in that the families have no way of knowing whether men MIA have been taken prisoner. The resolution after adoption was distributed to the President and Vice President of the United States, to the Speaker of the House of Representatives, and to each senator and representative from California in the Congress.

6. *Resolution of the California Legislature Commending The Judge Advocate General of the Army.*⁶¹

In July 1971, there was adopted free from any dissenting vote in the California Assembly, via the powerful Rules Committee, a resolution relative to commending Major General George S. Prugh, Jr. upon his appointment as The Judge Advocate General of the Army.

The resolution recites that General Prugh has dedicated approximately 30 years to devoted and distinguished service with the armed forces. He received his high school training and his university degree and his legal education in the schools and colleges of California. He was first enrolled in the military with the 250th Regiment Coast Artillery, California National Guard, and was commissioned 2nd Lieutenant in the Coast Artillery, and served

with distinction in WW II in various branches. Upon completion of his legal studies, the young man returned to the Army, and has had worldwide legal service including assignment as Assistant Staff Judge Advocate, Sixth Army Hqrs., Presidio at San Francisco. He has completed courses of study at the Command and General Staff College and at the Army War College. General Prugh has maintained the status of citizenship of the State of California, and is an active member of the California Bar Association.

The resolution concludes that the Members of the Legislature congratulate General Prugh upon his merited promotion to the high office of TJAG, and commend him for his many notable and significant achievements, and express unqualified praise for his record of dedication and service to the nation and his fellowmen, including the People of his own State of California.

A suitable framed copy of the beautiful, parchment resolution was forwarded to TJAG at his Headquarters. The resolution was read and directed to General Prugh *in absentia* at the Annual Meeting of the Judge Advocates Association in London on July 16, 1971. The resolution was read to TJAG in person at a luncheon in

⁶¹ 1971 Rules Com. Res. #541, effective July 8, 1971. The resolution was introduced by a distinguished attorney-legislator, Assemblyman Edwin L. Z'berg of Sacramento at the behest of the No. Calif. Chapter, JAA.

his honor at the California Bar Association and the JAA in San Diego in September 1971.

VI. SIGNIFICANT STATUTES FROM ALL STATES.

1. *Florida Conservatorship Statute.*⁶²

The Governor of the State of Florida appointed a select committee to investigate the problems being encountered by the families of POWs and of men MIA with regard to Florida and to make recommendations to him on possible solutions to the problems which existed. The committee was composed of certain lawyers and a representative of the POW and the MIA families.⁶³

At the 1971 Session of the Florida Legislature, there was introduced SB #938⁶⁴ entitled "An Act relating to conservatorships; amending section 747.02, Florida Statutes, providing for jurisdiction of the circuit court to establish conservatorships; creating section 747.021, Florida Statutes, to provide for summary procedures with respect to certain property of an absentee etc."

The scope of the Florida Statute is perhaps best set forth in the Legislative Service Bureau Summary⁶⁵ which is attached to SB #938 and reads, as follows, in part:

"Amends Section 747.02, F. S., to provide that circuit court, as opposed to county court, have jurisdiction to appoint a conservator of estates of absentees if shown: absentee has interest in any form of property in state; or is legal resident of state; or wife or next of kin is legal resident of state and absentee has not provided adequate power of attorney with regard to property; or power of attorney has expired; and necessity exists to care for property or estate of absentee; judgments concerning his wife or children or if none then mother or father. Section 747.01, F. S., defines absentee as serviceman in armed forces or merchant marine during period of hostilities, reported or listed missing in action, interned in neutral country, beleaguered, besieged, or captured; or any resident of state, or property

⁶² Fla. Stats. 1971, ch. 71-103, pp. 245-49, in West Fla. Sess. Service, 1st Reg. Sess.: approved by Governor and filed with Secty. of State, June 3, 1971, effective July 1, 1971.

⁶³ The Chairman of the Committee was Hon. Walter S. McLin, III, of Leesburg, Fla. Consult "Legal Assistance to POW-MIA Military Personnel", Am. Bar Assn., Young Lawyers Sec., Sept. 1971.

⁶⁴ Op. cit. supra, note 62.

⁶⁵ Ibid., SB 938, pp. 11-12. The bill, as adopted, is stated to be effective July 1, 1971.

owner in state who disappears under circumstances indicating his death, mental derangement, amnesia," etc., etc.

The clear advantage in the Florida Statute, above, is the express recognition of the unusual status of POWs and those MIA. It is believed that most states have some form or another of a conservatorship statute to meet the problem of absentees in or out of the state from their homes, occupations, families, etc. Undoubtedly, specific recognition of POWs and the MIA, as in Florida, is an excellent solution to the problem of these unfortunate servicemen and their families throughout America.

It is suggested that in another area of the POW-MIA complexity, California AB #665⁶⁶ may be of value to permit now the wife or widow or family of the POW and the MIA to come into the statutory benefits available to a "veteran" under state law and as if the serviceman was acting in his own behalf.

2. *Legal Assistance by the Armed Services.*

Each of the Armed Services provides Legal Assistance to members of that Service who may be

overseas or in continental United States. In a real sense, words are inadequate to describe the great merit and the excellent assistance extended to all military personnel by those law officers or judge advocates or legal assistants or law specialists on active duty with the armed services throughout the world.

There was prepared in the Office of The Judge Advocate General - United States Air Force, a summary or listing of "Selected State Laws Concerning POWs and MIA", dated 1 August 1971.⁶⁷ In chart form, all of the states are listed alphabetically and information of a legal nature is advanced in such particulars as "Presumption of Death after Specified Time", "Power of Attorney", "State Income Taxes", "Conservator or Other Procedures", etc. The summary of state laws is here duplicated verbatim together with the page of explanatory footnotes released by the Air Force.

The Department of the Navy, Office of TJAG, has promulgated a similar itemization of Selected State Laws Concerning POWs-MIA with Footnotes on 13 September 1971.⁶⁸ Additionally, there is excellent discussion of such timely items as "Tax notes", tax

⁶⁶ Op. cit. supra, note 56.

⁶⁷ Release from the Office of TJAG - USAF, "Selected State Laws Concerning POWs and MIA, with Footnotes MIA/PW, apparently 1 August 1971.

⁶⁸ Release from the Department of the Navy, Office of TJAG, (1) POW/MIA state law summary, (2) *Florida Statute*—POW/MIA, (3) Dollar Value Package. The Fla. Stat. is that discussed in this writing, #VI (1); see note 62, supra.

withholding, automobile damage as possible tax deductible loss, etc.

The Army on 10 November 1971 has released vital data affecting POWs and MIA.⁶⁹ The same summary of state laws and explanatory footnotes, utilized by each of the Air Force and the Navy, have been distributed to Legal Assistance Officers. Additionally, there is made available, a Compendium of Vietnam Bonus Laws. Statutes granting a *bonus to Vietnam veterans* have been adopted in six states, namely, Connecticut, Delaware, Illinois, Louisiana, Massachusetts and Pennsylvania. Undoubtedly, other states will enact similar legislation.

The state bonus authorizations to date are:⁷⁰

1. Connecticut—\$10. monthly is paid from 1 January 1964 for active service not to exceed the sum \$300.

2. Delaware—\$15. monthly is paid from 1 January 1964 for service in continental U. S. not to exceed \$225. \$20. monthly is granted for active service outside of the U. S. not to exceed \$300. maximum.

3. Illinois—\$100. is payable to serviceman or to his widow, children, parents, brothers or sisters. If death resulted from Vietnam service, the sum \$1,000. is payable to his beneficiaries.

4. Louisiana—\$250. is payable for service since 1 July 1958 in the Vietnam conflict. If death resulted, the amount \$1,000. is payable to the widow (if not remarried), children under 18 years, or surviving parents.

5. Massachusetts — \$200. is payable for service since 1 July 1958. \$100. additional is paid for active service in the Vietnam area. Payment may be made to the heirs of a deceased serviceman.

6. Pennsylvania—\$25. monthly is paid for active service in the Vietnam area not to exceed \$750. If death resulted from Vietnam service, the sum \$1,000. is payable to the beneficiaries.

3. *State Legislation Affecting Reservists.*

There is reason to believe that the diminishment in the number of men called via Selective Service

⁶⁹ Letter from TJAG, "Legal Assistance for Dependents and Next of Kin of Captured or Missing Members", Checklist for Legal Assistance to Dependents of POW/MIAs, Selected State Laws etc., Footnotes MIA/PW, and Compendium of Vietnam Bonus Laws, 10 Nov 1971.

⁷⁰ The partial statutory references for the six states are: *Conn.* Pub. Acts 1967, No. 422, p. 522; *Mass.*—Stats., Ch. 646; *Dela.* lacking; *Ill.*—Stats., Ch. 126½, Sec. 57.51 et seq.; *La.*—Stats., Ch. 29, Sec. 293; *Penn.*—Act # 183; see 1969 P. L. 40, #14.

OFFICE OF THE JUDGE ADVOCATE GENERAL—UNITED STATES AIR FORCE
SELECTED STATE LAWS CONCERNING PRISONERS OF WAR AND MISSING IN ACTION

STATES	FINDINGS OF DEATH		Provides for Conservator Or Other Procedures to Protect Property Rights of MIA's and/or PW's (Unless indicated otherwise, applies to both) ¹	POWER OF ATTORNEY		STATE INCOME TAXES (In all cases See All State Income Tax Guide)			
	Presumption of Death After Specified Time	Accept Federal Missing Persons Act Finding—Prima Facie Evidence		Specific Statute—MIA Status does not affect Power of Attorney	Bona-fide Transactions Binding on all Parties—if no Actual Notice of Death	Exempts Mil Pay or No State Income Taxes	Abate Taxes if Death Occurs as a Result of Combat Zone Injuries	Same Combat Zone Exclusion as Fed Taxes	Miscellaneous
Alabama	7 years	X		X		X ²			
Alaska	Jury determination					X			X
Arizona	7 years		X				X		
Arkansas	5 years		X		X	\$6000			
California	7 years	X	X (MIA-90 days)		X	X			
Colorado	7 years	X	X (MIA)	X			X	X	
Connecticut	7 years	X	X (MIA)		X				
Delaware	7 years	X	X	X	X				X
District of Columbia	7 years	*							
Florida	7 yrs (C/L)	X	X ⁴	X	X	X			
Georgia	7 years	X	X (MIA-90 days)	X	X		X	X	
Hawaii		X	X	X	X				
Idaho	7 yrs (C/L)		X (90 days)	X		X			
Illinois	7 yrs (C/L)					X			
Indiana	5 years	X	X	X	X	\$2000			X
Iowa	5 years	X	X	X	X	X			
Kansas	7 years	X ⁵	X (MIA)		X ⁶			X	
Kentucky	7 years		X				X	X	
Louisiana	30 years		X (MIA)		X	X (outside US)			
Maine	7 years	X							
Maryland	7 yrs (C/L)	X	X (MIA)	X	X		X	X	
Massachusetts	7 years		X						X
Michigan	7 yrs (C/L)	X	X	X	X	X			
Minnesota	7 yrs (C/L)	X	X (MIA)	X	X	\$5000	X	X	
Mississippi	7 years	X	X	X	X				
Missouri	7 years			X	X	X			
Montana	7 years			X	X				
Nebraska	7 yrs (C/L)		X		X				X
Nevada	7 years	X	X	X ⁷					
N. Hampshire	7 yrs (C/L)	X	X		X	X			
New Jersey	7 years	X	X		X	X			
New Mexico	7 years				X				X
New York	5 years	X	X	X	X			X	X
No. Carolina	Jury determination	X	X (MIA)	X			X	X	
No. Dakota	7 years	X			X	X			
Ohio	7 years		X		X	X			
Oklahoma	7 years	X	X		X	X			
Oregon	7 years	X	X (90 days)		X ⁸		X	X ⁹	
Pennsylvania	7 years	X	X (1 year)			X			
Rhode Island	7 years	X	X	X	X				
So. Carolina	7 yrs (C/L)		X ¹⁰	X	X				X
So. Dakota	7 years		X	X	X	X			
Tennessee	7 years	X	X	X	X	X			
Texas	7 years		X ¹¹	X	X	X			
Utah	7 yrs (C/L)		X	X	X	X ¹²			
Vermont	7 years ¹³	X	X			X			
Virginia	7 years		X	X	X				X
Washington	7 years	X	X ¹⁴	X	X	X			
West Virginia	7 years	X	X						X
Wisconsin	7 yrs (C/L)		X (MIA)		X				X
Wyoming	7 years	X	X (90 days)	X	X				

All bases are asked to periodically review the chart and make any corrections necessary. Revisions should be noted in a letter to HQ USAF (AF/JACA).

KEY
Blank means No or Insufficient Information.
X means Yes.

[See Footnotes on Page 76]

The Judge Advocate Journal

The Judge Advocate Journal

FOOTNOTES MIA/PW

¹ Often an X designation in this column indicates that, while there is no specific MIA/PW statute or case law on point, general statutory provisions may be applicable.

² Exempt military pay only while in combat zone.

³ Some protection may be found for MIA/PW's under Title 20 of the D.C. Code which provides protection for absentees up to 14 years.

⁴ Florida has recently passed new legislation streamlining its old statute. The new statute is considered a model to be followed by other states.

⁵ No specific status but Secretarial determination would be permissible under statutes concerning "exceptions to hearsay rule." See KSA 60-460(0) and KSA 60-413-414.

⁶ If recorded.

⁷ Nevada has no specific statute concerning the validity of powers of attorney of MIA/PW's. However, NRS 161.010 implies that an adequate power of attorney will be recognized in administering the property or estate of a MIA/PW if such exists, and if not, it then goes on to provide for the appointment of a conservator.

⁸ There is no specific statute concerning MIA/PW status. 60 Okla Statute, Section 361 (1961), concerning the appointment of a conservator, and 60 Okla Statute 367 (1961), which allows a person acting under a power of attorney, when read together seems to indicate that MIA/PW status does not affect the power of attorney.

⁹ A bill is presently before the Oklahoma Legislature to repeal the present tax code and adopt the Federal rules for the determination of taxable income.

¹⁰ South Carolina has no code section concerning the appointment of a conservator to protect the property rights of persons MIA/PW. General guardianship laws (See Title 31, S.C. Code), when read in conjunction with Section 26-132 concerning missing persons, would seem to provide relief on an *ad hoc* basis where the missing person would suffer irreparable harm or loss of property.

¹¹ Texas recently passed a new law on MIA/PW's.

¹² If the person was outside the U.S. on duty for 18 consecutive months, no taxes are due.

¹³ After five years absence, the missing person's will can be probated. See Title 14 of the Vermont Statutes, Section 919.

¹⁴ RCW 11.80.010 was not intended to contemplate PW's as it is quite possible that a PW's whereabouts might be well established, thereby placing him outside the strict interpretation of the statute. There is no case law on point.

may have an adverse effect upon recruitment for the reserve components. The volunteer army notion may also have a similar deterrent effect upon young men who formerly might have joined the reserves in order to avoid induction into the military. The following legislative bills show an intent to stimulate enlistment and reenlistment in the National Guard.

AB #1523,⁷¹ introduced March 15, 1972, would exempt from public higher education (college level) tuition charges, persons who have served in the California National Guard with at least two years of honorable service. For each year of additional honorable service in the Guard after the first two years, the reservist is relieved from tuition charges for one more academic year, but not to exceed four years. If his military service becomes unsatisfactory, his exemption is forfeited for that year and he is obligated to pay all yearly tuition charges for the current year. If adopted into law, the measure would encourage otherwise qualified young men, at the college level, to assume and keep up an active reserve (National Guard) status.

In 1971, AB #1255⁷² would have made National Guardsmen eligible for State Cal-Vets. *loans*

after satisfactory performance of reserve obligations for seven years. If effect, the reservist achieved the status of a "veteran" in order to qualify for the receipt of certain statutory benefits under various laws. The present statutes generally restrict benefits to veterans who have had military service in federally-recognized conflicts. The bill received favorable consideration in the Assembly, but was not approved in the Senate where the measure was not brought to a vote. It is submitted that the various States might well extend benefits to Guardsmen in such areas as educational loans, tuition or similar state colleges charges, automobile and vehicle licensing, fish and game licensing, etc.

VII CONCLUSION

We may anticipate that to an increasing extent the Armed Services may become concerned with state legislation of special impact upon members of the armed forces and their families. At the present time, it is believed that all of the states have personnel who entered the armed forces from those states and who are now classed POWs or MIA. If the Department of Defense continues to stress a future maintenance of the Armed Services by at least partial reli-

⁷¹ 1972 Assembly Journal, p. 1033, March 15, 1972. The bill is still in the course of legislative consideration.

⁷² 1971 Assembly Journal, p. 1347, March 25, 1971. As to Cal-Vet. loans, see Point III of this writing.

ance upon voluntary enlistment, we may expect that Legal Assistance in the Services should involve an extensive working knowledge of state laws which deal with probate, testacy, conservatorship, veterans' loans for farm and home

purchases, educational assistance, etc. Apart from Legal Assistance, on the home front there is a grave, continuing problem that there must be enacted satisfactory civil and criminal immunity statutes to protect National Guardsmen.



LAW DAY AT THE PENTAGON

The Pentagon Chapter of the Federal Bar Association and the Judge Advocates Association co-sponsored a Law Day observance at the Pentagon on 1 May 1972. The program began with the Presentation of the Colors by the Joint Services Color Guard and included musical renditions by The U.S. Navy Band and The U.S. Army Chorus. The principal speaker was The Honorable Lawrence J. Hogan, U.S. Congressman for the 5th District of Maryland. Mr. Hogan's address is as follows:

As the resolution designating this as Law day says, this is a time to pause and rededicate ourselves to the ideal of equality and justice under the law and to cultivate that respect for law which is so vital to a civilized society. It is also an opportunity to pause and review what kind of progress we are making toward those goals.

While there is evidence of a prevalent disrespect for the law today, paradoxically, interest in the legal profession is booming.

Consider the experience of Washington area law schools for a moment.

Georgetown, which has facilities for about 600 new students, has received about 6,000 applications for the 1972-73 academic year. This is roughly the same number as last year when applications virtually doubled. George Washington University's

National Law Center has received over 5,000 applications for 400 places. Catholic University's Columbus School of Law has approximately 2,200 applications for 210 openings.

But, unfortunately, a great many of our law students today have little understanding of how our system works. Either because they are impatient with our progress toward a fully just society or because they misunderstand the proper role of the legal profession—many of our law schools and an ever growing number of lawyers have embarked on a false and dangerous course which threatens the critical balance of power between the legislative and judicial functions in our society.

The new breed of lawyers who see themselves as social activists is, in many cases, trying to short circuit the constitutional process that has served us so well for nearly 200 years. They are trying to usurp the function of the legislative branch. In short, they want the courts to make the law as well as interpret and define it.

The perils of this course are obvious. If the courts make laws as well as interpret and define them, there is virtually no check on their power. What some view as a short cut to a social utopia could well become a social nightmare and bring an end to our gov-

ernmental system of checks and balances.

Usurping the legislative function by the courts is the first giant step toward a society run by legal technocrats who would write their own laws, pass on their validity and then monitor their implementation. Such power would be disturbingly similar to that wielded by the high priests in ancient Egypt.

I am not trying to suggest we are on the verge of such a society, only that we have been pushed down that path and it is time to plant our feet firmly before we go any farther.

I believe our law schools share part of the blame for this situation because they have failed to teach many of their students the proper function of the law and the lawyer.

One example comes to mind immediately—the group of law students who picketed the law firm representing the Dow Chemical Company for making napalm which was being used in Vietnam. Their action demonstrated an appalling lack of knowledge of the American legal process. Under our system everyone has the right to the best possible legal representation. That principle holds for a welfare recipient, an indigent criminal and the Dow Chemical Company. The fact that law students would picket a law firm for defending *any* client is incomprehensible to me and indicates total disrespect for, and lack of understanding of, our system of

justice and the role of a lawyer in our society.

I think the law schools have failed their students in another way—by diluting the quality of the offerings in the traditional and vital disciplines in order to meet the demands for so-called “socially relevant” courses.

Many of the courses being offered might be relevant for a social scientist, but they are not relevant in a law school curriculum when they direct a student's energy and intellectual pursuit away from the law itself before he has even learned the rudiments of legal thinking and legal principles.

In addition, the vast smorgasbord of courses and the specialists who teach them have increased the cost of law school tremendously. In fact, the skyrocketing costs of legal education have pushed such education out of the reach of millions of Americans and created the very real possibility that legal education will become almost exclusively the province of a privileged elite. When I graduated from Georgetown Law School in 1954, my recollection is that tuition was \$12 per credit hour. Today it is \$80 per credit hour and is increasing to \$88 this fall.

Of course, the distortion of the proper roles of the legal profession and the courts is not confined to some law schools and students.

We have only to look to the recent Richmond school busing deci-

sion which ignored legal boundaries and ordered consolidation of suburban school districts with the Richmond School District to see a classic example of a judge overreaching his authority to achieve what he—not the legislature (or the people who speak their will through the legislature)—what he construes to be a socially desirable course of action. The busing of 78,000 students will be the result if his decision stands.

To my mind, the court there has literally tried to make its own law. The judge, in fact, first suggested to the Richmond school system that an appropriate method to achieve the proper racial mix in the schools would be to strip away the legally established political boundaries and consolidate the school districts.

Then, when such a proposal was submitted to him, he ordered its implementation. The court, in effect, wrote its own law and is now trying to impose it without any regard to the separate function of the legislative side of government.

All of us recognize that the legislative process is frequently slow—frustratingly slow—in responding to the needs of the people, especially the oppressed and disadvantaged. But that is the nature of the process, of the push and shove, pull and tug, as the people make their feelings known to their elected representatives.

The making of new laws ought to be a slow, deliberate, painstaking

process. That's why our legislatures debate issues so comprehensively and weigh all points of view. When we're dealing with the rights, property and lives of our people we should proceed carefully and cautiously, and the laws which are enacted should and usually do represent a good consensus of what the people want and need.

The individual might personally disagree with the result, but, under our democratic system, we are all obliged to obey the law until it is repealed or changed. To do otherwise leads to anarchy and the total breakdown of an orderly, people-run society.

The success of our system of government depends upon the consent of the governed. The people know they have a full voice in the shaping of our laws, and they know that their legislators, their elected representatives, must be directly responsive to their will. Under those circumstances they have shown themselves willing to submit to the will of the majority and our system has survived and flourished.

But, on the other hand, Federal judges, are responsible to no electorate. They are not subject to removal by the ballot box. And that is as it should be if the judiciary is to function properly and independently as a check on the legislature. But the system falls apart when the courts seek to assume a legislative role. When this happens, you will have not the rule of the people, but rule

by fiat. Then the people will have no voice, no power and democracy will be dead!

When the courts usurp the legislative role and rob the people of their right to influence the making of laws, we see a growing loss of respect for the law. The public will not stand for "legislation without representation."

While preserving the respective, independent roles of our three branches of government, we must direct the energies of our legislative and executive branches toward solving our social problems and eradicating the injustices and inequities in our system.

Among other things that means we must find ways to insure the equal protection of the law for the poor, the forgotten, the oppressed and the disadvantaged. And that means the dedication of lawyers in government to that cause.

In particular I would like to see programs go forward which make the legal talents of government lawyers available to the indigent in their full time.

Unfortunately, at the present time, as members of the Federal Government these government lawyers may not participate in court-appointed counsel programs.

Obviously, government attorneys should be barred from participating in trials in which there is an actual conflict of interest between service to a client and the Government, but the blanket exclusion of a Federal criminal case creates a category that is too broad and denies the indigent ac-

cessed access to a wealth of talent.

Primary emphasis in appointed-counsel systems has necessarily been directed toward criminal cases where counsel is constitutionally required. But justice also demands that the poor be represented in our civil courts as well and that means we must make certain our current legal assistance programs are truly helping the poor as they were designed to do.

The other most serious problem of concern to the bar is, of course, the inability of our courts to meet basic constitutional "speedy trial" requirements. Most courts are plagued by huge and unmanageable backlogs of cases which, while delaying justice on the civil side of the docket, are most serious on the criminal side. Not only does long delay between arrest and trial make a fair trial more difficult, but such delay is a major contributing factor to our high rate of recidivism. Such delay, invites plea-bargaining, and encourages potential criminals to continue careers in crime since there is a good chance they will never be apprehended, or, even if they are apprehended, they may never have to face trial.

Thanks to Congress' reform of the District of Columbia court system, in which I was privileged to play a leadership role, trial delays are no longer a court trademark here. In February, the first anniversary of the establishment of the Superior Court was celebrated with the release of statistics showing that:

Misdemeanor cases are now tried within four weeks instead of seven.

Felony cases are tried within five to six weeks instead of two years.

Civil cases are tried within seven months instead of two years.

Misdemeanor suspects who waive their right to a jury trial are usually tried within seven days.

That's the kind of court reform that's needed in every judicial system in the country.

Only through effective reorganization of our court system can we meet the new challenges that are placed upon our judicial system today. Only if all citizens can be provided with real and ready access to the courts will we be able to maintain confidence in our legal system.

Another factor which affects confidence in our legal system is insisting that all laws be obeyed. In this context, I'd like to refer to those among us—a small minority—who are clamoring for amnesty for draft dodgers and deserters.

I am vehemently opposed to amnesty not only because I feel that it would be a disservice to

those who did answer their country's call, especially those who gave their lives or were wounded or imprisoned but for an even more basic reason. I oppose amnesty because, if we allow some of our citizens to choose the laws they wish to obey and those they wish to disobey, the result will be anarchy. So, as we celebrate Law Day today, we should recognize that for a continuance of our civilized society under law, it is essential that all citizens obey all laws.

There are those among us who would destroy our system and paradoxically replace it with a system of government which allows no dissent. Our system gives us—the people—the power to change our government and change the laws which govern us. In their misguided zeal to achieve what they think will be a social utopia they run the risks of destroying the system of government by laws which is not only our best hope but the best hope of all men in the world who love liberty.

As we honor Law Day, we should rededicate ourselves to preserving and improving this system of government.



What The Members Are Doing . . .

CALIFORNIA

The John P. Oliver Chapter (Southern California) of the JAA held its spring meeting at the House of Magic in Hollywood in March. Col. Robert E. Walker is president of the chapter. The vice presidents are Lt. Col. Jess Whitehill, Brig. Gen. Robert D. Upp and Col. James C. Bigler. Col. Mitchel Zitlin is secretary. The chapter is actively pursuing a program of bringing an understanding and appreciation of the military justice system to professional and lay groups. One avenue toward this goal is the provision of speakers on the merits of the military judicial system to high school teacher groups and student bodies.

DISTRICT OF COLUMBIA

A formal dinner-dance was held at the Officers' Club of the National Naval Medical Center, Bethesda, Maryland, on 30 March 1972 honoring Rear Admiral Joseph B. McDevitt upon his retirement as The Judge Advocate General of the Navy, and Rear Admiral Merlin H. Staring and Rear Admiral Horace B. Robertson, Jr. upon their appointment as The Judge Advocate General and Deputy Judge Advocate General, respectively.

Col. John C. Herberg, formerly Legislative Counsel, United States

Senate, has become counsel to the firm of Hollabaugh & Jacobs with offices at 910 17th Street N.W., Washington.

Capt. Jules Fink announces the formation of the firm of Katz & Fink with offices at 1025 Vermont Avenue N.W., Washington.

GEORGIA

A National Memorial Day Program was held at Marietta on 29 May 1972. The Judge Advocates Association was one of the participating sponsors. Capt. Hugh H. Howell, Jr., past president of JAA, and president of the Memorial Day Association of Georgia, presided. JAA was represented by Colonel Russell A. Burnett, who recently retired as Deputy Judge Advocate, U.S. Third Army.

MASSACHUSETTS

The New England Chapter of the Association met on 19 May 1972 at the Officers' Club of the Headquarters, First Naval District, Boston. Colonel Sherman Davison, presided. The guest speaker was Colonel Robert Miller, a judge of the U.S. Army Court of Military Review.

MONTANA

Lt. Col. H. L. Holt, USAFR, recently announced the formation of the firm of Murray & Holt with offices in the Western Bank Building at Missoula.

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Executive Secretary and Editor

RICHARD H. LOVE
Washington, D.C.

