MILITARY JUSTICE IN THE CONSUMER PERSPECTIVE

Daniel H. Benson*

American military justice is under constant attack. It is distrusted by civilian lawyers, detested by the ordinary serviceman who is subject to it, and criticized by military legal officers who administer it.[1] The following comment by Robert Sherrill is typical of current criticism of military law:

> Because the military has been so singularly unconscious of its defects and so inept at correcting those it does recognize, countless attorneys, millions of servicemen and ex-GIs, some civilian jurists and even some politicians are now convinced that there is no use to wait longer for internal reforms and that the best thing to do is simply to take away the judicial process and return jurisdiction to the civilian courts.[2]

---

* Partner, Griffith, Brister & Benson, Lubbock, Texas. B.A., 1958, J.D., 1961, University of Texas at Austin. Member, District of Columbia and Texas bars. Mr. Benson has served as an Army judge advocate and military judge. He presently holds the rank of Major, U.S. Army Reserve.

1. *See* Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell,* 35 MIL. L. REV. 1 (1967); Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial,* 15 CATH. U.L. REV. 171 (1966); Schiesser & Benson, *Modern Military Justice,* 19 CATH. U.L. REV. 489 (1970); West, *A History of Command Influence on the Military Judicial System,* 18 U.C.L.A.L. REV. 1 (1970).

2. R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 217 (1970). A former military judge advocate has stated:

> Under this system of 'justice' military defendants for almost two hundred years have been subjected to despotic military judicial actions. To name only a few of the more common travesties that are or have been visited on victims of the system: denial of legal counsel, increase of adjudged sentences, rigged verdicts and sentences, reversal of acquittals, and outrageous intimidation of both assigned military defense counsel and members of the court.

West, *Command Influence,* in CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY 73 (J. Finn ed. 1971) [hereinafter cited as CONSCIENCE AND COMMAND]. Another author has expressed his criticism of the system in this manner:

> To be court-martialed, in Army lingo, means to be convicted. More than ninety percent of all courts-martial result in 'Federal Court conviction'—an insurmountable stigma in landing most civilian jobs. During the course of the Vietnam war there have been annually seventy thousand courts-martial, service-wide; in addition, some thirty thousand men receive general or undesirable discharges through 'board actions' every year. These are run by three-officer panels.

F. GARDNER, THE UNLAWFUL CONCERT 220 (1970). Regarding the gross abuses

The Supreme Court of the United States has recognized that "[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."[3]

Criticism of military justice is not new. Within a few years after enactment of the *Uniform Code of Military Justice*,[4] the actual functioning of the new Code was brought under sharp attack.[5] Thirty years earlier, a high-ranking Army judge advocate, Brigadier General Samuel T. Ansell, ruined his military career when he vigorously attacked the harsh system of military justice that existed during and after World War I.[6] There are even indications that some members of the committee appointed by Congress in 1776 to study and revise the Articles of War were not entirely satisfied with the result of their labors. The committee simply adopted, with minor modifications,[7] the British Articles of War. It was a choice based on expediency, as John Adams forthrightly acknowledged:

> There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. . . . I was, therefore, for reporting the British articles of war, *totidem verbis*.[8]

Whatever the intent of the committee members, the continuing current criticism is easier to understand when it is realized that, in essence, the fundamental principles of the American system of military justice are those of ancient Rome. In view of the composition of the committee it is astonishing that the American system of military justice reflects the char-

---

involved in administrative discharge proceedings, see Custis, *Due Process and Military Discharges*, 57 A.B.A.J. 875 (1971).

3. O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

4. 10 U.S.C. §§ 801-940 (1970) (originally enacted as Act of May 5, 1950, ch. 169, § 1, 64 Stat. 108).

5. *See, e.g.*, Keeffe, *JAG Justice in Korea*, 6 CATH. U.L. REV. 1 (1956).

6. *See* Ansell, *Some Reforms in Our System of Military Justice*, 32 YALE L.J. 146 (1922); Ansell, *Military Justice*, 5 CORNELL L.Q. 1 (1919); Brown, *supra* note 1; Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52 (1919). General Ansell was reduced from Brigadier General to Lieutenant Colonel on March 4, 1919. *Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Senate Comm. on Military Affairs*, 66th Cong., 1st Sess. 160-64 (1919).

7. For instance, expressions of allegiance to the Crown and reference to the colonists as "His Majesty's most faithful subjects" were deleted. *Compare* American Articles of War of 1775 *with* American Articles of War of 1776, in W. WINTHROP, MILITARY LAW AND PRECEDENTS 953-71 (1920 reprint, 2d ed. 1895). The committee members were John Adams, Thomas Jefferson, John Rutledge, Benjamin Franklin and William Hooper. 3 WORKS OF JOHN ADAMS 69 (C.F. Adams ed. 1851). The Articles are set forth at 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 788-807 (Lib. Cong. ed. 1906). They replaced Articles adopted a year earlier. 2 *Id.* 111 (1905).

8. 3 WORKS OF JOHN ADAMS 68 (C.F. Adams ed. 1851).

acteristics of a monarchial, rather than a republican, form of government. As one commentator observed: "[O]ne would have anticipated that a distinctive American democratic flavor would be instilled into any code which it recommended for the government of men who were created equal. Nothing could be further from what occurred."[9]

In any event, the American system of military justice has been the subject of hostile criticism for years, and the intensity of the criticism is mounting rapidly. This is especially true among rank-and-file servicemen.[10] Gardner suggests that the rights of rank-and-file servicemen are undergoing such critical scrutiny today because

> GIs are demanding [their rights]. More than three million men and women find themselves subject to the UCMJ—most of them involuntarily. Some five percent of the draftees are college graduates. They are young in a country where young people are questioning their parents' values. Many of them are black and figure their primary fight is for equality at home. Others are downright political—by virtue of their education or background on the streets—and consider the war wrong as well as futile. Some are poor and see no connection between the war and their own needs. Among the WAC and nurses are innumerable women who joined the service because they felt oppressed by small towns, the dullest of jobs, meager pay; now they find their oppression has deeper roots. And there are hundreds of thousands of Vietnam returnees who are antiwar because they have seen war.[11]

This article will examine critically the military's official perspective of military justice, including the affirmative deceptions practiced consciously or unconsciously by the military to reinforce that perspective. Military justice will then be viewed from an entirely different perspective, that of its most frequent consumer, the rank-and-file serviceman. This latter examination will demonstrate the gross inequities of the present system of military justice. Finally, an alternative system of justice for military personnel will be proposed.

The title and approach[12] of the present work are based on a 1963 article by Edmond Cahn, entitled *Law in the Consumer Perspective.*[13] It

9. Schiesser, *supra* note 1, at 172.

10. F. GARDNER, *supra* note 2, at 217: "Many GIs feel they need an ombudsman. Currently, Congressmen receive about five hundred letters a day from soldiers. These have no political impact, since they are never collated, never perceived or presented to the public as anything but random incidents."

11. *Id.* at 225.

12. In his foreword to an anthology of Cahn's works, the late Justice Hugo L. Black said of Cahn:

> A major purpose of his books, and indeed of his life, was to promote, through analysis and discussion, governmental processes that would achieve justice. I find in his writings the same kind of inspiring arguments for equal justice for all people that is found in those enduring books which contain the maxims and precepts of the great religions and philosophies of the world.

Black, *Foreword* to E. CAHN, CONFRONTING INJUSTICE, at xi (L. Cahn ed. 1966).

13. Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963).

is unnecessary to expand upon Cahn's concepts;[14] all that is needed is to apply them to military justice. Although the consumer perspective is of primary concern, an understanding of the philosophy of the official perspective is essential to a proper appreciation of the consumer perspective.

THE OFFICIAL PERSPECTIVE

The armed services, perhaps in the hope that the criticism will dissipate, steadfastly refuse to recognize the problem. They officially view military justice as a superb system of modern criminal law and procedure. This view is evidenced by the praise usually lavished on the entire system by military lawyers.[15] There have been, however, some exceptional and courageous military officers, such as Ansell[16] and Lieutenant Colonel Charles W. Schiesser,[17] who have recognized the system for what it is and, even in the midst of the military career milieu, have done their best to reform it. Unfortunately, men of this nature are the exception, and their efforts have been slow to bear fruit. Although the United States Court of Military Appeals was intended by Congress to exercise close and skeptical supervision over those few military cases reaching it for review,[18] it has adopted the viewpoint of the military.[19]

Surprisingly, one of the early spokesmen for the official viewpoint of military justice was none other than Professor John Henry Wigmore, who adopted this position on military law: "The prime object of military organization is Victory, not Justice. . . . If the Army *can* do justice to its

14. For discussion of an important additional factor in military law which is not present in civilian law, affirmative deception, see text accompanying notes 32-64 *infra*.

15. *See, e.g.*, Birnbaum, *Rights of the Convicted*, 4 TRIAL, Feb.-Mar. 1968, at 14; Hodson, *"Is There Justice in the Military?"*, 15 ARMY RES. MAG., Nov.-Dec. 1969, at 22; O'Malley, *Mapp, Miranda and the Accused*, 4 TRIAL, Feb.-Mar. 1968, at 10; Ward, *UCMJ—Does it Work?*, 6 VAND. L. REV. 186 (1953); Westerman, *Court of Military Review*, 24 ARMY DIGEST, Oct. 1969, at 10, 11.

16. *See* Brown, *supra* note 1.

17. *See generally* Schiesser, *supra* note 1; Schiesser & Benson, *supra* note 1. Lieutenant Colonel Charles W. Schiesser is presently on active duty as a career Army legal officer, the status that he occupied when he authored the cited articles. Justice Douglas, writing for the majority in O'Callahan v. Parker, 395 U.S. 258 (1969), noted Schiesser's 1966 analysis of the unfairness of the military "jury" in trials of enlisted personnel. *Id.* at 263 n.2.

18. Most of the court-martial cases tried under the present system of military justice can never reach the Court of Military Appeals for appellate review, because they do not come within the narrow limits of that court's jurisdiction as set forth in 10 U.S.C. § 867(b) (1970). Of the 72,243 Army court-martial convictions in 1969, the Court of Military Appeals had jurisdiction for direct review in only 2,323 of such cases; 464 petitions for grant of review, which are similar to petitions for a writ of certiorari in the Supreme Court of the United States, were processed in 1969, but review was granted in only 61 cases. *See* ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION 17-18 (1969).

19. *See* Benson, *The United States Court of Military Appeals*, 3 TEX. TECH. L. REV. 1 (1971). This is somewhat similar to the Interstate Commerce Commission's adoption of the industry viewpoint rather than a watchdog outlook. *See* R. FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970).

men, well and good. But Justice is always secondary; and Victory is always primary."[20] Wigmore continued:

> Military justice wants *discipline*—that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men. The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring in a particular case, what was the regulation or order, and whether it was in fact obeyed. But its object is discipline.[21]

The present official perspective, which is not significantly different from Wigmore's primitive approach, was expressed quite accurately as follows: "The aims of [the American and French] systems of military justice are the same—swift enforcement of military order and discipline while guaranteeing to the accused the maximum legal protections *reasonably available under the circumstances.*"[22] The *Army Staff Judge Advocate Handbook* (SJA Handbook) states: "Military justice in a very real sense represents the correctional side of military discipline."[23] This, then, is the official approach to military justice, the official perspective.

Philosophy of the Official Perspective

The definitive explanation of the official perspective of law was set forth by Edmond Cahn who said: "All the modern legal systems have inherited a single characteristic way of viewing the problems of society. We may call it the 'imperial or official perspective' because it has been largely determined by the dominant interests of rulers, governors, and other officials."[24] According to Cahn, the official perspective "has a typical rhetoric which, when expertly manipulated, can seem very persuasive."[25] This rhetoric is persuasive because it makes use of phrases and maxims that would be reasonable if restricted to their proper uses. All too frequently, however, such language is misused by those promoting the official perspective.[26] Cahn concluded that while it may be true in

20. Address by Professor Wigmore to the Maryland Bar Association, June 28, 1919, in 24 MD. ST. B. ASS'N TRANS. 183, 188 (1919), *reprinted in* Wigmore, *Lessons from Military Justice*, 4 J. AM. JUD. SOC'Y 151 (1921). Wigmore was a reserve colonel in the Army Judge Advocate General's Department.

21. *Id.*

22. Ryker, *The New French Code of Military Justice*, 44 MIL. L. REV. 71, 93 (1969) (emphasis added).

23. DEPARTMENT OF THE ARMY, STAFF JUDGE ADVOCATE HANDBOOK 7 (Pamph. 27-5, 1963) [hereinafter cited as SJA HANDBOOK].

24. Cahn, *supra* note 13, at 4.

25. *Id.* at 5.

26. Cahn gave some examples, *id.* at 6:

> Some of the familiar phrases are: the public interest in getting things finally settled; the duty to abide by established principles and precedents; the necessity of showing respect for expert judgment and administrative convenience; the dominant need for certainty in the law; the obligation to preserve the law's predictability so that men will know how to order their affairs; the danger of opening the gates of penitentiaries

some instances that "hard cases make bad law," frequently, as a result of the rationalizations put forth by advocates of the official perspective, "bad law makes hard cases."[27] It is traditional for jurists of the official perspective, Cahn noted, "to justify the legal system in terms of averages, wholesale statistics, and overall performances."[28]

Cahn's philosophy of the official perspective of law is consistent with the rationalizations employed by the official supporters of the present system of military justice. In military justice, as in the law generally, those who support the official perspective are the "rulers, governors, and other officials." They are the judge advocates general, the senior commanding officers, the judges of the United States Court of Military Appeals, and the judges of the various courts of military review.[29] They employ a rhetoric which seems extremely persuasive when "expertly manipulated." Furthermore, as Cahn pointed out, the persuasiveness of such rhetoric is based upon the reasonableness the phrases and maxims have when restricted to their proper uses. The problem is that in military law, as in other areas of the law using the official perspective, they are not so restricted.[30] Military authorities also seek to justify the present system of military justice in terms of "averages, wholesale statistics, and overall performances."[31] The points made by Cahn about the official perspective of civilian jurisprudence and courts, therefore, are applicable with equal force to military law and courts-martial.

Affirmative Deception

An additional factor, insofar as military justice is concerned, is the affirmative deception engaged in by advocates of the official perspective in military law. It is a delicate matter, but its examination is fundamental to a correct understanding of the actual functioning of American military justice.[32] If properly understood, the matter of affirmative deception may have a significant impact on reform legislation in the future.

. . . and (by way of solace to the man on his way to the electric chair) the undeniable right to petition for executive clemency.

27. *Id.* at 8.

28. *Id.* at 16.

29. These are the intermediate appellate courts in the American military justice system. *See* 10 U.S.C. § 866 (1970).

30. See text accompanying note 64 *infra.*

31. Cahn, *supra* note 13, at 16. *See generally* articles cited *supra* note 15 for examples of such justifications.

32. The question of affirmative deception on the part of advocates of the official perspective in military justice apparently has not been raised in the literature of the legal profession. It has been discussed to some extent in nonlegal books and articles concerning military justice. *See, e.g.,* F. GARDNER, *supra* note 2; R. SHERRILL, *supra* note 2; West, *supra* note 1. See also Henry B. Rothblatt's trenchant account of the vast difference between military justice in theory and in practice as he experienced it while acting as defense counsel in the Green Berets' case. Rothblatt, *Why the Army Tried to Railroad the Green Berets,* TRUE, Mar. 1970, at 29-33, 96-97. Affirmative deception, however, has never been precisely delineated as such or considered specifically as a significant individual phenomenon in our system of military law. Although some aspects of this deception were dis-

Neither the motives of those who engage in such deception nor the extent to which they are aware of their conduct is raised here. They may have been so deeply indoctrinated with the military viewpoint that they simply do not perceive the divergence between the official perspective and the objective facts of military justice as it functions. A senior career Army officer has said:

> [T]he whole Army structure is pervaded with fear of reprisals that stifles any whisper of dissent. Reprisal can come in many forms—the 'efficiency report,' secret 'security' investigation, character assassination, professional ostracism and humiliation. The consequence is to keep many good officers gagged in obedience to the Army's protective self-deceptions, and frees the less observant to get away with anything. One self-deception is that the end justifies the means . . . .[33]

Regardless of the motives or awareness of those who utilize the deceptions of the official perspective, the question of affirmative deception must be closely examined to appreciate its significance in military justice. It is beyond the scope of this article to catalog and discuss all of the deceptions practiced by advocates of the official perspective in military law. Accordingly, three typical examples—the nature of the military judge, the alleged abolition of command influence, and the role of the staff judge advocate—will be set forth.

The military judge is an appropriate example with which to begin. With the enactment of the Military Justice Act of 1968,[34] the position of "military judge" was created. In an early article a senior Army judge advocate wrote that the military judge "has been given functions and powers more closely allied to those of a federal district judge, except that in a trial with court members [the military jurors], the members still determine the sentence."[35] A senior military judge of the United States Air Force Court of Military Review, stated that a military judge has "functions and powers more closely aligned with those of Federal district judges."[36] Former Chief Judge Robert Quinn of the Court of Military Appeals expressed the view that the provisions relating to the military judge in the Military Justice Act of 1968 "will conform military procedures more closely to that of the Federal civil courts."[37] In addition, there has

---

cussed peripherally in Schiesser, *supra* note 1, and Schiesser & Benson, *supra* note 1, the matter was not isolated for special consideration. *See also* Benson, *We are the Casualties,* 21 REFORMED J. 3 (1971); Benson, *The Christian and Military Justice,* 20 REFORMED J. 6 (1970).

33. King, *Making it in the U.S. Army,* NEW REPUBLIC, May 30, 1970, at 19-21.

34. 10 U.S.C. §§ 801-936 (1970). The presiding legal officer at a court-martial was formerly designated a "law officer."

35. Westerman, *supra* note 15, at 11.

36. Goldschlager, *The Military Judge: A New Judicial Capacity,* 11 A.F. JAG L. REV. 175 (1969). The author was as well a senior judge advocate prior to August 1969.

37. Letter from former Chief Judge Robert E. Quinn of the United States Court of Military Appeals to Philip J. Philbin, Chairman of the Committee on Armed Services, Subcommittee No. 1, *quoted in* Goldschlager, *supra* note 36, at 180.

been "widespread undiscriminating comparison of military judges with federal district judges"[38] in the literature of the legal profession.[39]

The truth about the status and functioning of the military judge renders such widespread comparison with a federal district judge ludicrous. A military judge has no tenure; he is merely a judge advocate officer who can be assigned to judicial duties by his judge advocate general or by the personnel branch within his particular judge advocate general's corps. He can be removed from judicial duties without cause, advance notice, or a hearing.[40] Some military judges are assigned to armed services headquarters in Washington, D.C., and then located for duty purposes in various posts, bases and stations around the country and the world. The vast majority of military judges, however, are assigned directly to the local senior commanding officer of the particular post, base or station.[41]

The ruling of a military judge dismissing a specification before a court-martial, where the ruling does not amount to a finding of not guilty, can be set aside by the military officer who convened the court-martial and ordered the charges to trial.[42] Unlike a federal district judge, a military judge has no power to order the confinement and release of an individual under any circumstances. A military judge "finds" an accused guilty, but that finding and the ensuing sentence have no legal effect until and unless the lay military officer who convened the court approves it.[43] If the lay convening authority disapproves all or any part of the finding of guilt or the sentence, which he may do with or without reason, the military judge is absolutely powerless to alter that determination.[44] A military judge has certain very limited powers to hold a service member in contempt of court, but that determination and any sentence imposed have no legal effect until and unless the military commander who convened the court approves them.[45]

---

38. Schiesser & Benson, *supra* note 1, at 498.

39. *See, e.g.*, Cutler, *The Right and Duty of the Law Officer to Comment on the Evidence*, 35 MIL. L. REV. 91 (1967); Grimm, *Criminal Justice in the Military Establishment*, 37 J. AM. JUD. SOC'Y 14, 19 (1953); Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39 (1959); O'Connell, *Independent Judiciary of the Army*, 5 BOSTON B.J. 21, 22 (1961).

40. Both the Code and the *Manual for Courts-Martial* are silent on the matter of tenure for military judges. Compare the provisions of the Administrative Procedure Act, 5 U.S.C. § 7521 (1970), which allow removal of a federal hearing examiner only after an opportunity for a hearing and upon a showing of good cause.

41. Army Reg. 27-10, ¶ 9-2(c-d) (change 8, Sept. 7, 1971); *cf.* Douglass, *The Judicialization of Military Courts*, 22 HAST. L.J. 213 (1971).

42. DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 67f (rev. ed. 1969) [hereinafter cited as MANUAL]. *See also* DEPARTMENT OF THE ARMY, ANALYSIS OF CONTENTS [OF] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 REVISED EDITION (Pamph. 27-2, 1970).

43. 10 U.S.C. §§ 860, 864 (1970).

44. *Id.* § 864. *See also* United States v. Kirsch, 15 U.S.C.M.A. 84, 91, 35 C.M.R. 56, 63 (1964); United States v. Massey, 5 U.S.C.M.A. 514, 520, 18 C.M.R. 138, 144 (1955).

45. 10 U.S.C. § 848 (1970); MANUAL, *supra* note 42, at ¶ 118.

A military judge has no power to enforce the orders of his court; for example, all orders for the production of evidence and witnesses depend upon the response, or lack of it, by lay military commanders.[46] The court over which a military judge presides does not come into existence until the order of a military commander gives it life. Similarly, the military commander can abolish it by a military order whenever he wishes.[47] No court-martial exists until a military commander creates it with a military order,[48] and indeed the Army Court of Military Review recently noted that courts-martial "are not a portion of the Judiciary of the United States. They are part of the Executive, rather than the Judicial, branch of our Government."[49] There are other significant ways in which a military judge differs from a federal district judge, but the foregoing specific items should suffice to make it abundantly clear that whatever a military judge is, he differs in many important respects from a federal district judge.

A second affirmative deception is the assertion that command influence on military justice has been virtually abolished in the armed services. Nothing could be further from the truth. The extensive study by Luther West, a former career Army judge advocate, plainly shows and adequately documents the widespread extent of improper command influence throughout the legal branch of the Army today.[50] Military commanders still frighten, intimidate, and thoroughly control legal functionaries in the American system of military justice, whether the legal functionary is a prosecutor, defense counsel, court member ("juror"), staff judge advocate (senior legal adviser to a commander), or Judge Advocate General. Henry Rothblatt's article on the Green Berets' case,[51] although written for popular consumption, is the first-hand report of a veteran criminal trial lawyer and author of several books on criminal trial work. Rothblatt details thoroughly the almost incredible degree to which General Creighton Abrams, Jr., was able to control, influence, and ultimately determine the final disposition of the Green Berets' case, notwithstanding the requirements of procedure, the *Uniform Code of Military Justice*, or other aspects of military law. Both Robert Sherrill and Fred

46. Control over military personnel rests with military commanders of various units, posts and stations; only they can order military personnel to attend trials as witnesses, in response to the "order" of a military judge. Similarly, such commanders control official military records, and may or may not produce them on demand by a judge. *See, e.g.*, Army Reg. 195-10, ¶ 4-4f (Jan. 8, 1968), which requires the express approval of the Provost Marshal General for release of military police investigation reports.

47. MANUAL, *supra* note 42, at ¶ 5a.

48. *See* United States v. Robinson, 13 U.S.C.M.A. 674, 33 C.M.R. 206 (1963).

49. United States v. Bowman, 42 C.M.R. 825, 828 (1970). *See* C. WRIGHT, LAW OF FEDERAL COURTS 34 (2d ed. 1970).

50. West, *supra* note 1; West, *Command Influence,* in CONSCIENCE AND COMMAND, *supra* note 2.

51. Rothblatt, *supra* note 35. Henry Rothblatt recently served as defense counsel in the trial of Colonel Oran K. Henderson for his conduct in connection with the events at My Lai.

Gardner list incident upon incident of unlawful command influence in the trial of recent court-martial cases.[52] Command influence remains a powerful and corrupting influence throughout military justice.

By contrast, the position of advocates of the official perspective is that command influence, as a significant problem in military law, is a thing of the past. They cite the provisions of the Military Justice Act of 1968 which "strengthen"[53] the prohibitions against command influence.[54] The amendments to the Code, however, merely list and prohibit various kinds of unlawful command influence not specifically mentioned under the prior Code. Despite these new provisions, unlawful command influence persists.

The Court of Military Appeals apparently views command influence as almost nonexistent, since it has seen fit to consider the issue so infrequently. The *Uniform Code of Military Justice* was in existence for 10 years before the first significant case of alleged command influence reached the court in 1961, and another 6 years passed before the court again acted on the issue.[55] This record says little about the actual existence of command influence in the armed services, but it speaks clearly about the extent to which the Court of Military Appeals may be divorced from the reality of the situation. Former Judge Latimer once said: "[I]f anyone now believes that a court-martial is merely an agency of the commander, and governed solely by his whims, then he is too blind to see what has clearly been spelled out by members of Congress."[56] Apparently the trial of Lieutenant William Calley made a believer out of Latimer, now in private practice, who defended Calley. He insisted that command influence in the *Calley* case started with President Nixon and worked its way down through the Army's chain of command.[57]

A third deception may be found in the provisions of the *Manual for Courts-Martial*, the *Uniform Code of Military Justice*, and the assertions of apologists for the official perspective: the chief legal officer of a command, the staff judge advocate, is a detached and impartial quasi-judicial official.[58] The staff judge advocate has the duty of providing legal advice

52. F. GARDNER, *supra* note 2; R. SHERRILL, *supra* note 2.

53. Simpson, *How the MCM, 1969 (Rev.) Provides for: I. Improvements in Trial by Special Court-Martial, II. Increased Safeguards Against Command Influence, III. Simplified Procedures on Oaths and Records of Trial*, 11 A.F. JAG L. REV. 181, 193 (1969).

54. 10 U.S.C. § 837(b) (1970). *See* Comment, *The Military Justice Act of 1968: Congress Takes Half-Steps Against Unlawful Command Influence*, 18 CATH. U.L. REV. 429 (1969).

55. *See* United States v. Kitchens, 12 U.S.C.M.A. 589, 31 C.M.R. 175 (1961); United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

56. Commencement address by George W. Latimer, former judge, U.S. Court of Military Appeals, to the Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, Jan. 18, 1952, *quoted in* Landman, *One Year of the Uniform Code of Military Justice: A Report of Progress*, 4 STAN. L. REV. 491, 508 (1952).

57. *See* R. SHERRILL, *supra* note 2, at 217.

58. *See generally* 10 U.S.C. §§ 834, 861 (1970); MANUAL, *supra* note 42, at

to the commander on all military justice matters.[59] Moreover, the staff judge advocate is the immediate commanding officer of all prosecutors and defense counsel in the particular command; he renders their military efficiency reports, assigns them to various cases, determines their role in a given case, and otherwise controls their functioning in his office. In the broadest sense, he closely resembles a civilian district attorney. Yet he is the official who must perform the conflicting functions of advising the senior military commander whether to refer a case to trial, and then, after trial of the case, of *impartially and objectively* preparing a review of the matter and advising the commander what action should be taken to affirm, alter or reject the findings and sentences. Merely to state the proposition upon which his functioning is based is to refute it; no man can judge his own work impartially. That impossible task, in effect, is what the spokesmen of the official perspective in military justice are advocating.

The result of this particular deception has been tragic, for it is largely through the staff judge advocate that most of the unlawful command influence in the military justice system is perpetrated. Former Judge Advocate West states:

> Neither the concept nor practice of military justice could have developed as they have within the Armed Forces of the United States were it not that the Supreme Court and the American people have been tragically indifferent to the plight of the military defendant. Neither our people nor our courts acknowledge that military commanders and military staff judge advocates are not fair-minded men in the judicial sense of the word; that they are, basically, incapable of operating a system of justice along democratic principles.[60]

Indeed, the SJA Handbook—which is a practical manual for the operation of a staff judge advocate's office rather than a publication designed to bolster the image of the military justice system—bluntly informs all staff judge advocates that they are representatives of the command first, and lawyers second.[61] The Handbook also informs the staff judge advocate that since "his efficiency report will usually be prepared by the chief of staff . . . [he] must be a working and cooperative member of the staff."[62] He is pointedly reminded that he "must acquaint himself with the personality and the policies of his commander."[63] These instructions are un-

¶ 85; West, *supra* note 1, at 106-07; West, *Permissible Bounds of Staff Judge Advocate Pretrial Activity*, 23 MIL. L. REV. 85 (1964).

59. *See generally* SJA HANDBOOK 7-53.

60. West, *Command Influence*, in CONSCIENCE AND COMMAND, *supra* note 2, at 73-74.

61. SJA HANDBOOK at 75: "First, the staff judge advocate of a command is a staff officer and, as such, has the duty to assist the commander to command effectively and to accomplish the assigned mission. Second, as a judge advocate, he is the military legal advisor to the commander."

62. *Id.* at 76.

63. *Id.* at 8.

likely to foster the development of independent legal officials who can function with courage and impartiality. They serve as warnings to the staff judge advocate that his first loyalty is to his commander, even to the detriment of his legal judgment.

Many additional deceptions could be described, but the three examples set forth are sufficient to demonstrate that the official military perspective relies on more than mere exaggeration of the merits of the system in order to sustain itself. The way in which apologists of the official perspective in military justice use language to accomplish such deception raises serious linguistic questions and borders on the Orwellian. Linguistic analysis seeks to clarify the meaning of statements by investigating the way in which they are ordinarily used.[64] The same methodology might be used profitably in the field of military justice, where advocates of the official perspective misapply words having specific connotations. The term "independent" when applied to a military judge is one example. When used to describe a federal district judge, the word "independent" has certain well-understood, accepted connotations. A federal district judge is appointed for life on good behavior and cannot be removed from office on the basis of unpopular decisions. This independence tends to promote a certain fearlessness and integrity commonly associated with the federal judiciary. It is a misuse of language, however, to refer to a military judge as independent and to compare him with a federal district judge. Furthermore, it is deceptive to attempt to qualify the use of the word "independent" when talking about a military judge, for it must be qualified to the point where it no longer retains any vestige of its original meaning.

The foregoing analysis of affirmative deception is essential since the official perspective in military justice cannot be fully understood without an appreciation of the extent to which deception is practiced to make palatable the grosser inequities of the present system.

THE CONSUMER PERSPECTIVE

Edmond Cahn explained that the consumer perspective in law looks at the targets of the law's impacts:

> In the consumer perspective, the significance of any principle, rule, or concept, however exalted, is investigated by observing the specific human targets of its impacts and the occasions when it becomes material to concrete experiences of the members of the community. It was this method that disclosed that the sense of injustice—rather than a purported sense of justice—exerted vital influence within the operations of law.[65]

64. Linguistic analysis has been brought to bear in recent years in the field of religious language. *See* P. VAN BUREN, THE SECULAR MEANING OF THE GOSPEL 81-106 (1963); NEW ESSAYS IN PHILOSOPHICAL THEOLOGY (A. Flew & A. MacIntyre eds. 1955).

65. Cahn, *supra* note 13, at 14.

Most of the defendants tried by American courts-martial, the specific human targets of military justice, are enlisted men in the lower ranks and grades of the armed forces. Trials of officers and senior noncommissioned officers are comparatively rare. This fact is of great significance in an examination of any aspect of American military justice.

The system of military justice is under officer control which begins with an enlisted man's immediate commanding officer and culminates in the almost unlimited power of the officer who is the convening authority. Charges are usually preferred by the serviceman's immediate commanding officer, transmitted to officers for processing through trial and conviction, and then given to the convening authority, who alone can refer charges to trial by court-martial.[66] After trial the case may go to the court of military review of the particular service, where once more officers pass upon the legal and factual sufficiency of the case.[67] Since they do not have the money to retain civilian counsel, the overwhelming majority of military defendants have officers for defense counsel at all trial and appellate levels. The case eventually may reach the United States Court of Military Appeals where, for the first time, there are no officer-judges.

Most military "jurors" are officers; at most, a military defendant can expect only one-third of his court members to be enlisted personnel, and even for that proportion he must make a written demand prior to trial.[68] Furthermore, the armed services again have managed to practice a cruel deception on the Congress, the Court of Military Appeals, and the enlisted personnel subject to court-martial jurisdiction: if an enlisted service member demands enlisted court members, senior noncommissioned officers (sergeants) will usually be appointed by the convening authority.[69] Senior sergeants are among the least sympathetic and the most

66. 10 U.S.C. § 834 (1970).

67. An exception is the Navy Court of Military Review which permits civilian judges to sit with officers.

68. 10 U.S.C. § 825(c) (1970).

69. Joseph W. Bishop, Jr., now Richard Ely Professor of Law at Yale, and in 1952-53 Deputy General Counsel and Acting General Counsel of the Army, said in a 1970 article: "The code entitles an enlisted man to demand that enlisted men be among the members of the court-martial that tries him, but he knows that what he will probably get are first and master sergeants, who are likely to be rougher than commissioned officers." Bishop, *The Quality of Military Justice,* N.Y. Times, Feb. 22, 1970, § 6 (magazine), at 38. It was the intent of Congress that an enlisted soldier should be tried, if he so desired, by a panel consisting of at least one-third of his *peers* rather than senior sergeants. See *Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 21st Cong., 1st Sess. 1140 (1949). Judge Homer Ferguson, of the Court of Military Appeals, dissenting in United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964), noted that the Army practice of always appointing only senior noncommissioned officers has "rendered valueless" the right envisioned by Congress and commented that the still existing technical right "to have enlisted personnel on one's court-martial has become a relatively dead letter throughout the armed services." *Id.* at 55, 35 C.M.R. at 27. This is the natural result of placing senior noncommissioned officers on court-martial panels when enlisted men are requested.

conviction-oriented of all the members of the armed forces, with the exception perhaps of the senior officers.[70] A low ranking enlisted service member has little hope of being tried by a "jury" of his peers, and, regrettably, the Court of Military Appeals has actually sanctioned that result.[71]

The sense of injustice mentioned by Cahn arises when the largest single segment of the military population is denied the right to participate in the military judicial process except as criminal defendants. Theoretically, any member of the armed services can prefer charges against any other member,[72] but in practice, throughout the American system of military justice, officers are in full control. The right of a private to prefer criminal charges against a commanding general is, therefore, largely illusory.

Perhaps the best way to summarize the general inequities of the entire American military justice system is to consider the stark powers of the convening authority, which are vastly greater than those vested in any single official in any civilian judicial system[73] and include the exclusive right to refer a case to trial. Most of the courts-martial tried in the armed forces are special courts-martial,[74] which require no formal pretrial investigation. In order to refer a case to a general court-martial,[75] however, the convening authority must first order a formal "Article 32 Investigation," so designated because it is required by that article of the Code.[76] The Article 32 Investigation is praised by advocates of the official perspective who compare it to and extol its superiority over grand jury investigation.[77] There is a catch, however, in the best tradition of Joseph Heller's *Catch 22*. The catch is that no matter how thorough or satisfactory the investigation, the convening authority is not bound to follow the recommendations made by the officer who conducted it.

---

70. Edward Sherman points out that "non-commissioned officers . . . are usually considered even more disciplinarian and severe than officers." Sherman, *Justice in the Military*, in CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY, 21, 48 (J. Finn ed. 1971). *See also* Bishop, *supra* note 69.

71. United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964). *See* Benson, *The Military Jury: An Unrepresentative Tribunal?* 7 TRIAL, Sept.-Oct. 1971, at 40; Higley, *Flawed Justice*, 7 TRIAL, Sept.-Oct. 1971, at 45.

72. 10 U.S.C. § 830 (1970).

73. See authorities collected in note 47 *supra*.

74. Special courts-martial have jurisdiction to try military personnel for any noncapital offense punishable under the *Uniform Code of Military Justice* (UCMJ). They are empowered to adjudge any punishment not forbidden by the UCMJ except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. 10 U.S.C. § 819 (1970).

75. General courts-martial have jurisdiction to try military personnel for any offense punishable under the UCMJ. They are empowered to adjudge any punishment not forbidden by the UCMJ, including the penalty of death where specifically authorized. *Id.* § 818.

76. *Id.* § 832.

77. *See, e.g.*, Moyer, *Procedural Rights of the Military Accused Over a Civilian Defendant*, 22 ME. L. REV. 105, 109-14 (1970).

Gardner illustrated perfectly this basic flaw in the Article 32 Investigation by describing how the convening authority in the Presidio "Mutiny" Cases completely overruled the investigating officer's report recommending no mutiny court-martial, and referred the cases to trial.[78] Furthermore, during the trial the convening authority has the power to overrule decisions of the military judge on issues of law,[79] and after the trial to approve all, part, or none of the findings and sentence, as he sees fit. All this is in addition to his power to appoint judge, "jury," prosecutor, and defense counsel in every case.[80]

The armed services are apparently unconcerned that the great majority of American servicemen have no opportunity to participate in the judicial system to which they are subject during their period of military duty.[81] Edmond Cahn would have disagreed, believing as he did that when it comes to justice one cannot merely classify the consumers of law as facets or fragments of men, but must consider them as whole men: "[The law] puts the whole man in jail, hangs the whole man, takes away money, status, and property that affect the life of the whole man. When it imposes guilts, they pervade the whole man."[82] Our system of military justice regularly and systematically deprives whole men of the right to participate in the judicial system under which they must live for a significant part of their lives. It imposes guilt upon these same whole men, and they resent and chafe under the arbitrary functioning of such a system. This situation is not only unsatisfactory, but also unnecessary.

First, it is not necessary to deprive lower ranking enlisted men of their rights as American citizens. Other nations treat their soldiers differently and more humanely:

> Soldiers in the West German Army can now join unions and negotiate with the government as to living and working conditions; also, the German Army has recently junked the appellation 'sir' in addressing superior officers. The East German Army did away with sirring long ago. France, shocked by the obedience of junior officers to rebellious generals in Algeria, has rewritten its code of justice to permit much more independence of thought and action. And in some respects the Israeli Army is almost a classless society.[83]

Similarly, our ordinary enlisted personnel should be allowed to participate in the system of justice to which they are subject.

Second, there is likely to be a harmful long-term effect on Ameri-

78. *See* F. GARDNER, *supra* note 2, at 106-10.
79. MANUAL, *supra* note 42, at ¶ 67f.
80. 10 U.S.C. §§ 825-27 (1970).
81. The basic, consistent position of the armed forces is that the present officer-controlled system of military justice is virtually without flaw. See authorities collected *supra* note 15, and note that no discussion of the opinions or reactions of enlisted personnel to the present military law system is presented.
82. Cahn, *supra* note 13, at 15.
83. R. SHERRILL, *supra* note 2, at 220.

can society as a whole if a large segment of the population are deprived of their legal rights for a period of two to four years of their lives. As Robert Sherrill correctly stated: "Justice is too important to be left to the military. If military justice is corrupt—and it is—sooner or later it will corrupt civilian justice. Perhaps this has already begun."[84] Sherrill further noted that when one-fifth of all adults have had some military service, it is no longer possible to separate military life from civilian life. The lessons and experiences of the one are carried over into the other. It is unhealthy for rights—indeed, to deprive them of justice itself—during the period of their our society to deprive large numbers of our younger citizens of substantial military service, and then expect them to resume their places in civilian society with an attitude of trust toward our courts and faith in our civilian judicial system. In view of the teachings of Edmond Cahn about the consumer perspective, this is folly of a very serious nature, and its effects upon us are likely to be long-lasting.

REFORM OF MILITARY JUSTICE

Past reforms of the *Uniform Code of Military Justice* have been ineffective in correcting the defects inherent in the American system of military justice. As West expressed it in his definitive analysis of unlawful command influence:

> The military judicial setting is still dominated by military commanders, from the inception of charges to the completion of appellate review, with the exception of the handful of cases each year that are subject to review by the United States Court of Military Appeals, and in these cases only a semblance of constitutional protection against command control is afforded the military defendant.[85]

Further piecemeal reform would be inadequate so long as real control of the military legal system remains in the hands of the nonlegal military commanding officers.

In 1970, Lietuenant Colonel Charles W. Schiesser and the author proposed specific reforms considered essential to an adequate overhaul of the present military justice system.[86] It was recommended that military judges be given the tenure and independence necessary to make them comparable to federal district judges, and urged that military convening authorities be divested of the power to overrule military judges on issues of law.[87] It was also suggested that military appellate judges be given sufficient tenure and independence to enable them to discharge their responsibilities, and that the various armed forces courts of military review be provided with specific statutory authority to issue extraordinary writs

84. *Id.* at 213.
85. West, *supra* note 1, at 151.
86. Schiesser & Benson, *supra* note 1, at 518-19.
87. *Id.*

in aid of their jurisdiction.[88] It was further proposed that convening authorities be divested of their power to determine the membership of the courts-martial that they convene, and recommended that defense counsel for all court-martial cases be granted full independence and insulation from the pressures that may now be exerted upon them by military commanders.[89] An independent, central defense organization to which all military defense counsel would be assigned was suggested as a possible method of providing adequate protection for those military lawyers who defend the consumers of military justice.[90] Beneficial as these changes might be, however, they would still constitute mere patchwork reform, and this, unfortunately, is characteristic of the reforms proposed by other concerned observers of our military justice system.[91]

Although the American military justice system was altered by reform legislation in 1920, 1950 and 1968, "the basic court structure, the method of selection of the court, the commander's control of the court machinery, the statement of certain crimes, and the heavy reliance on administrative reviews rather than judicial appeals have not been substantially altered."[92] West even goes so far as to question whether the changes made by such legislation were, in any meaningful sense, reforms at all.[93]

If this is true, then what is the solution? West proposes to transfer all military justice functions from the armed forces to a civilian agency:

> With only minor exceptions, the system of military justice in this county must be completely removed from the operational control of the military departments, and placed in the hands of civilian administrators, preferably under the control of the Attorney General of the United States.[94]

That step in the right direction constitutes the minimum reform that should be undertaken, but more is required.

The United States may look to Germany for an example of what is needed in the American system of military justice. In spite of traditional German militarism, military justice in the Federal Republic of Germany has been returned to civilian control. Criminal offenses committed by German armed forces members are tried in the civil rather than military courts.[95] Although this represents a radical departure from the immediate past, the Germans are quite satisified with their new system.[96]

---

88. *Id.* at 519.
89. *Id.* at 518.
90. *Id.* at 508.
91. *See, e.g.*, Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 86-87, 96-100, 102-03 (1970).
92. *Id.* at 59.
93. "Our lesson from history is that lesser reforms, designed to leave the military judicial system in the operational control of military commanders, or to leave the punishment of military commanders who overreach the system in military hands, *are reforms in name only*." West, *supra* note 1, at 154 (emphasis added).
94. *Id.* at 153-54.
95. *See* N.Y. Times, Apr. 11, 1969, at 12, col. 1; *id.*, Apr. 9, 1969, at 3, cols. 1-2.
96. When the West German army was established in 1955, it was constructed

Legislation should be enacted withdrawing jurisdiction from the military justice system for all offenses other than crimes against the military, such as absence without leave, refusal to obey orders and desertion. All other jurisdiction, including crimes created by the common law and state and federal statutes, should be vested exclusively in the state and federal courts having subject-matter jurisdiction for those crimes and within whose geographical jurisdiction the crime was committed.

The Supreme Court, by its 1969 decision in *O'Callahan v. Parker*,[97] adopted this general approach and divested the military of some of its prior court-martial jurisdiction. The defendant in *O'Callahan* had been convicted by a court-martial of nonmilitary offenses committed in a civilian community while he was on leave.[98] A majority of the Court held that the military was without jurisdiction to try such offenses under the circumstances, since there was no "service connected" crime involved. The majority opinion noted that the petitioner was properly absent from his military base when he committed the crimes with which he was charged, the crimes were not committed on a military post or enclave, the situs of the crime was not an armed camp under military control, there was no connection between the crimes charged and the defendant's military duties, the victim was not performing any duties related to the military, the crimes were peacetime offenses and were committed in American territory rather than in a foreign country, the civil courts were open and functioning, and the crimes did not involve any flouting of military authority.

Due to the careful enumeration of factors which removed this case from court-martial jurisdiction, the opinion's scope is somewhat uncertain. It is at least arguable that if one or more of the listed characteristics were not present, the same court would have found that the exercise of military jurisdiction was proper.[99] This uncertainty is heightened by the recent appointment of two new associate justices to the Supreme Court of the United States. It appears, therefore, that further limitations on court-martial jurisdiction are more likely to be enunciated by Congress than by the Court.

---

on democratic principles, and troops were made subject to civilian courts for discipline. There have been no military courts in West Germany since the collapse of Hitler's regime in 1945, and there has been general satisfaction over the absence of courts-martial. Sherman, *supra* note 91, at 92.

97. 395 U.S. 258 (1969). Held to have prospective application only, Gosa v. Mayden, 450 F.2d 753 (5th Cir. 1971).

98. O'Callahan was charged with attempted rape, housebreaking, and assault with intent to rape in violation of 10 U.S.C. §§ 880, 930, 934 (1970), respectively. It is interesting to note the breadth of section 934:

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

99. *Compare* 395 U.S. at 273, *with id.* at 283 (Harlan, J., dissenting).

Some problems inhere in the approach suggested in this article. Jurisdiction would overlap in some cases, as it does now with respect to state and federal courts, where a particular act by a serviceman violated a combination of military, state and federal criminal statutes. The same offenses may be punishable under both state and federal laws, in which case state and federal courts will have concurrent jurisdiction over them. Prosecution and conviction by both federal and state courts for the same acts which violate federal and state laws, regardless of which court convicts the defendant first, do not constitute double jeopardy in violation of the fifth amendment of the Constitution.[100] Double jeopardy is not involved because the prosecutions are by two different sovereigns. Separate prosecutions would not be permitted, however, in federal and military courts even when the same conduct violated both federal and military laws, since both courts are arms of the same, single sovereign.[101] Thus the only priority which would have to be established is between military and federal jurisdiction when an act violated both military and federal laws.

Cases raising serious jurisdictional conflicts, however, would be exceptional rather than commonplace, and most cases could easily be classified as military, federal or state. In any event, the difficulties would be far outweighed by the advantages of transferring jurisdiction over all nonmilitary offenses from the military to the civilian courts.

A more serious problem is presented by those cases involving criminal offenses committed by military personnel outside the territorial limits of the United States. The United States district court for the district in which the offender is arrested or is first brought upon return to the United States,[102] presently has jurisdiction to try American citizens for criminal offenses begun or committed on the high seas or in aircraft flying over the high seas.[103] Present federal statutes could be expanded to cover comparable situations involving offenses committed by armed forces personnel on or over the high seas.

Offenses committed by American service personnel within the territorial limits of foreign countries present even more difficult problems. It is doubtful whether federal district courts could be given jurisdiction over such offenses. First, there is the settled principle that every sovereign nation has the right, and the jurisdiction, to try all persons who commit criminal offenses within the territorial limits of that nation. As a general

100. Abbate v. United States, 359 U.S. 187, 195 (1959) (state conviction followed by federal conviction); Bartkus v. Illinois, 359 U.S. 121, 139 (1959) (federal acquittal followed by state conviction); *see* Moore v. Illinois, 55 U.S. (14 How.) 13 (1853); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); *cf.* Waller v. Florida, 397 U.S. 387 (1970). The federal district courts have original jurisdiction over all offenses against the laws of the United States. 18 U.S.C. § 3231 (1964).

101. Waller v. Florida, 397 U.S. 387, 394 (1970); Grafton v. United States, 206 U.S. 333, 354-55 (1907).

102. 18 U.S.C. § 3238 (1970).

103. *Id.* § 7. *See* United States v. Bowman, 260 U.S. 94 (1922).

rule, that right can be modified only by treaty provisions, and in the absence of a specific treaty the United States would have no legitimate authority to exercise jurisdiction over American citizens who commit offenses in a foreign country.[104] Second, substantial constitutional questions involving due process would be raised by trial in the United States of a service member who had committed an offense thousands of miles away in a foreign country.[105] It requires little imagination to anticipate the almost insurmountable problems that would be created pertaining to investigation of the facts, preparation of the case, and securing the presence of essential witnesses on behalf of an accused. Without adequate provision for government payment of the expenses that would necessarily be involved, defendants who could not personally bear such expenses would be denied due process. Furthermore, it would be expensive to transport military defendants from foreign countries to the United States for trial.

One possible solution, where the civil courts of the foreign country are open and functioning, would be to allow those civil courts to try American military personnel for crimes committed in the foreign country involved. This arrangement is presently in effect in several countries where American troops are stationed, pursuant to treaty provisions and status of forces agreements.[106]

Perhaps a better solution would be to allow the military to continue to exercise its present jurisdiction over American service personnel who commit offenses in foreign countries. It is unsatisfactory to allow the present injustices to pervade any category of cases, but continuation of the military's present court-martial jurisdiction may be the only practical way to deal with military offenders who commit crimes in foreign countries.

RETURN TO THE ORIGINAL INTENTION

Whatever the problems, the time has come to terminate the military's jurisdiction over nonmilitary criminal offenses. Although, as the Supreme

104. *See* Schooner Exchange v. McFaddon, 11 U.S. (11 Cranch) 116, 136 (1812), where Chief Justice Marshall restated the general principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this jurisdiction must be traced to the consent of the nation, either express or implied.

105. The Supreme Court has said, however, that Congress has the power to provide for federal district court trials of discharged soldiers accused of offenses committed while in the armed services, presumably regardless of where the offenses were committed. Toth v. Quarles, 350 U.S. 11, 21 (1955).

106. *E.g.*, North Atlantic Treaty Organization Status of Forces Agreement, June 19, 1951, art. VII, 4 U.S.T. 1792, T.I.A.S. No. 2846; Protocol Agreement with Japan, September 29, 1953, 4 U.S.T. 1846, T.I.A.S. No. 2848, *concluded pursuant to* Administrative Agreement, February 28, 1952, art. XVII, ¶ 1, 3 U.S.T. 3341, T.I.A.S. No. 2492; Security Treaty with Japan, September 8, 1951, art. III, 3 U.S.T. 3329, T.I.A.S. No. 2491.

For a discussion of the history, validity and operation of such treaty provisions, see Wilson v. Girard, 354 U.S. 524, 526-30, 544-48 (1957).

Court observed in *Reid v. Covert*, "[t]he tradition of keeping the military subordinate to civilian authority may not be so strong as it was in the minds of those who wrote the Constitution,"[107] early American practice gave no broad, general criminal jurisdiction to courts-martial. Justice Douglas, speaking for the majority in *O'Callahan v. Parker*, noted:

> It was, therefore, the rule in Britain at the time of the American Revolution that a soldier could not be tried by court-martial for a civilian offense committed in Britain; instead military officers were required to use their energies and office to insure that the accused soldier would be tried before a civil court.[108] [Footnote omitted.]

In 17th century England the practice of court-martialing soldiers in peacetime evoked strong protests from Parliament.[109] Lord Chief Justice Hale wrote that trial by military courts "may not be permitted in time of peace, when the King's Courts are open for all Persons to receive Justice according to the Laws of the Land."[110] Hale commented that military justice is not a true system of law at all, but is "something indulged, rather than allowed as a law"[111] because of the need for order and discipline in the army. Sir William Blackstone agreed.[112]

Departure from that general principle by the British colonial troops and those in authority over them was among the grievances protested by the American colonists.[113] It is not surprising, therefore, that the Declaration of Independence included the complaint that George III had "affected to render the Military independent of and superior to the Civil Power." The Continental Congress emphasized in the Articles of War adopted in 1776 that it was important for the military authorities to ensure that soldiers who committed crimes would be brought to justice. Nevertheless, it is clear from the context of the provision that it was expected that the trials would be conducted in the civil courts.[114]

Although the practice followed was not always consistent, court-martial convictions for ordinary civilian crimes were set aside during the 19th century by military convening authorities on the ground that the charges alleged only a violation of the general criminal law and failed to state a military offense.[115] During the Civil War, Congress provided for trial

---

107. 354 U.S. 1, 23 (1957).
108. 395 U.S. 258, 269 (1969).
109. See Justice Black's excellent and thorough discussion of this area in Reid v. Covert, 354 U.S. 1, 25-27 (1957).
110. M. HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 41 (1713).
111. *Id.* at 40.
112. 1 W. BLACKSTONE, COMMENTARIES 400, 413 (Dawson reprint 1966).
113. See Justice Black's historical examination, in *Reid v. Covert*, of the protests of John Adams, Thomas Jefferson and others, against British abuses in the exercise of military jurisdiction. 354 U.S. at 23-30.
114. *See* 1776 ARTICLES OF WAR, art. 1, § 10, in W. WINTHROP, MILITARY LAW AND PRECEDENTS 1494 (2d ed. 1896, reprinted 1920).
115. *Id.* at 1124 nn.82, 88.

by court-martial of some civil offenses without regard to their effect on good order and discipline in the military forces, but this exception applied only "in time of war, insurrection, or rebellion."[116] It was not until 1916, just prior to American entry into World War I and comparatively late in the history of American military justice, that the Articles of War were revised to provide for military trial of certain specific civilian crimes in peacetime if committed by persons subject to military law.[117]

Thus, instead of being a radical departure from the historic British and American view of military justice, return of jurisdiction over soldiers who commit civilian offenses to the civil courts would be a return to sound original practice. It would also be consistent with the true intent of the authors of the Constitution. As the Supreme Court pointed out in *Reid v. Covert,* "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language"[118] in article I, section 8 of the Constitution, and was intended to be only a narrow exception to the normal and preferred method of trial in civilian courts. The Supreme Court went on to say that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections."[119] In *O'Callahan v. Parker* the Court adhered to this general view of the matter, noting that, in addition to being "singularly inept in dealing with the nice subtleties of constitutional law,"[120] courts-martial apply a body of substantive military law that is probably too vague to satisfy the standards developed by the civil courts.[121] The Court thus made it clear that in light of these and similar deficiencies in military law and trial practice, the historic principle of allowing the civil courts to try soldiers whenever possible is sound and should not be abandoned in favor of broad court-martial jurisdiction.[122]

In this article, military justice has been considered primarily from the consumer perspective, that is, the perspective of "the specific human targets of its impact."[123] It is important to remember, however, that society as a whole has a significant interest and stake in the extent to which military jurisdiction is controlled and limited. In *Toth v. Quarles,* the Supreme Court pointedly warned:

116. Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 736.
117. Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 651.
118. 354 U.S. at 21.
119. *Id.*
120. 395 U.S. at 265.
121. *Id.* at 265-66. Justice Douglas, writing for the majority, noted that "[o]ne of the benefits of a civilian trial is that the trap of Article 134 may be avoided by a declaratory judgment proceeding or otherwise." *Id.* at 266. Article 134 of the *Uniform Code of Military Justice,* 10 U.S.C. § 934 (1970), punishes as a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces" as well as "all conduct of a nature to bring discredit upon the armed forces."
122. 395 U.S. at 268-72.
123. Cahn, *supra* note 13, at 14.

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.[124]

Justice Douglas reached the heart of the matter when he observed that a civilian trial is held in an atmosphere conducive to the protection of individual rights, "while a court-martial is marked by the age-old manifest destiny of retributive justice."[125] It is unhealthy to permit such a system to be extended unduly and unnecessarily into what is properly the realm of the civil courts. For this reason the American people, as well as individual military defendants, have a vital interest in narrowing military jurisdiction to its proper limits. Only by such reform can the consumers of military justice become consumers of that substantially superior form of justice which is available to their nonmilitary fellow citizens.

124. 350 U.S. 11, 22 (1955).
125. O'Callahan v. Parker, 395 U.S. 258, 266 (1969).