MILITARY JUSTICE IS TO JUSTICE AS . . .

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This article is adapted from presentations made by Lt Col Everett to the American Bar Association and Federal Bar Association at their respective 1970 Annual Conventions.

According to the title of a recently published book, "Military Justice is to Justice as Military Music is to Music." This rather uncomplimentary view of military justice is apparently shared by Mr. Justice Douglas who, writing for the majority in *O'Callahan v. Parker*,[1] referred to "so-called military justice" and to "the travesties of justice perpetrated under the" Uniform Code of Military Justice. The low esteem in which the majority held military justice contributed substantially to the conclusion reached in *O'Callahan* that a serviceman can only be tried by court-martial for "service-connected" offenses—at least, if committed within the United States in time of peace.[2] Thus, it is quite important to examine this premise that military justice is significantly inferior in quality to civilian justice.

I. WHAT MODEL FOR COMPARISON?

In comparing military justice with the justice meted out in civil courts it must be noted at the outset that among civil courts there are substantial differences in trial procedure. Which civil courts, then, are to be used in the comparison?

As the offenses committed by American military personnel stationed overseas, trial in civil courts would normally be in the civil courts of the foreign countries where the offenses occur.[3] Thus, for such offenses the

[1] 395 U.S. 258 (1969).

[2] For a detailed criticism of the majority opinion, *see* Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice?*, 1969 Duke L. J. 853.

[3] There have been some proposals to extend the jurisdiction of American civil courts to include offenses committed by American military personnel overseas. Aside from the constitutional problems involved in establishing such criminal jurisdiction for the Federal District Courts and some possible diplomatic complications with the host countries where the offenses were committed, there would be a number of practical difficulties in arranging for the presence of witnesses. Thus, it seems likely that offenses committed by servicemen overseas will for the foreseeable future either be tried by court-martial, tried in a foreign court, or not punished at all.

safeguards available in courts-martial should be compared with those available in the courts of the foreign countries where American military personnel may be present. Although many of these countries are subject to basic requirements of procedural fairness contained in the NATO Status of Forces Agreements[4] and similar treaties, generally the procedures of a court-martial would afford greater protection to the accused than would be available in the foreign courts.[5] Recognition of this fact may dissuade the Supreme Court from applying the *O'Callahan* principle to non-service-connected offenses committed by American servicemen overseas.

As to offenses committed by servicemen within the United States, the most pertinent comparison is between court-martial procedures and those of the State courts. Because of the present limited criminal jurisdiction of the Federal courts and the nature of the offenses that service personnel are most prone to commit, it is far more likely that a crime committed by a serviceman—if not tried by court-martial—will be tried by a State court than by a Federal court.

This distinction was much more meaningful in 1951—when the Uniform Code first became law—than it is today. Cases like *Mapp v. Ohio*,[6] *Malloy v. Hogan*,[7] and *Gideon v. Wainwright*[8] have now cast State courts much more in the image of the Federal District Courts. However, differences still remain For example, the Supreme Court has not yet overruled *Hurtado v. California*,[9] which refused to require grand jury indictment in State criminal trials. The Bail Reform Act of 1966[10] has no counterpart in many States; nor does the Criminal Justice Act of 1964,[11] which provides compensation for attorneys representing indigents in Federal criminal cases. And, of course, there are many other differences.

II. PRIVILEGE AGAINST SELF-INCRIMINATION

Even with respect to the safeguards applicable to Federal criminal trials, military justice need not shrink from comparison. And a decade ago the Court of Military Appeals announced "that the protections in the Bill of Rights, except those which are expressly or by necessary implication, inapplicable, are available to members of our armed forces."[12]

As to the privilege against self-incrimination, the protections available in military justice is especially noteworthy. When the Uniform Code took effect in 1951, its Article 31[13] contained a warning requirement which was then almost unparalleled in Anglo-American law, the closest counterparts being the Judges' Rules in England and a Texas statute. Indeed, the Supreme Court relied on Article 31 to justify the warning requirement which it imposed in *Miranda v. Arizona*[14] in order to protect the Fifth Amendment privilege against self-incrimination. Furthermore, the applicability of Article 31 does not hinge on "custodial interrogation," as does the *Miranda* rule.

Although Article 31 does not require a warning of the right to counsel, as is necessary under *Miranda*, the Court of Military Appeals has imposed such a requirement, which it made retroactive to the date when *Miranda* was decided.[15] Moreover, the Court of Military Appeals has construed the wording of Article 31 to protect service personnel against being compelled to furnish hand-

[4] *See* Article VII, paragraph 9, of the Agreement.

[5] Moreover, in some instances there would be language problems for the accused serviceman despite the availability of an interpreter. Admittedly there have been instances when an accused serviceman preferred trial in the foreign courts because he anticipated that the sentence imposed would be less than that which he would receive from a court-martial.

[6] 367 U.S. 643 (1961).

[7] 378 U.S. 1 (1964).

[8] 372 U.S. 335 (1963).

[9] 110 U.S. 516 (1884).

[10] 80 Stat. 214.

[11] 78 Stat. 552.

[12] *United States v. Jacoby*, 11 USCMA 428, 430, 29 CMR 244, 246 (1960).

[13] 10 U.S.C. 831 (1964).

[14] 384 U.S. 436 (1966).

[15] *United States v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967).

writing[16] or voice exemplars,[17] or even to submit to blood tests in connection with criminal investigations.[18] This protection goes considerably beyond that which the Supreme Court has extended to civilians under its interpretation of the Fifth Amendment.[19]

Because the scope of the privilege for communications to physicians is narrower in military law than in many civil tribunals,[20] it is more likely in a trial by court-martial than in a trial elsewhere that statements made by the accused to a doctor will be used against him. Also, as there are many military duties to render reports and prepare records, the hazard may be greater in military life than elsewhere that, in carrying out one's reporting responsibilities, self-incrimination will occur;[21] but this danger is not unique to military life.[22]

Finally, it cannot be denied that the hierarchial system which characterizes almost every military establishment may create subtle pressures to make self-incriminating admissions, no matter how many warnings there may be of a suspect's right to remain silent and to have counsel present. The possible existence of such pressures was a reason for congressional enactment of Article 31 in the first place.[23] However, even for civilians interrogated by law enforcement agents, there are undoubtedly strong subtle pressures to confess. At this point it would not appear that military justice can go much further in protecting suspects against self-incrimination except to prohibit in all cases the reception in evidence of any admission made by a serviceman to military investigators. And to many this remedy would seem extreme.

III. GRAND JURY INDICTMENT

One justification advanced by Mr. Justice Douglas in his *O'Callahan* opinion was that the limitation placed on trial by court-martial for non-service-connected offenses would preserve the serviceman's right to grand jury indictment. Since the Supreme Court has not yet overruled *Hurtado v. California*,[24] the complete accuracy of his premise is not yet clear; the serviceman tried by a State court instead of by court-martial may be prosecuted on information, rather than indictment. Moreover, some have questioned whether the safeguard of grand jury indictment is very significant, since a prosecutor who is determined to obtain an indictment against someone will usually succeed in doing so—sooner or later.

In any event, Article 32 of the Uniform Code[25] does require pretrial investigation before charges may be referred to a general court-martial—the only military tribunal than can sentence a serviceman to dishonorable discharge, total forfeitures of pay and allowances, or confinement for more than six months. This military pretrial investigation results in sworn testimony, which is known to the accused and generally subject to cross-examination. In terms both of discovery of the Government's case and opportunity to

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[16] *United States v. Rosato*, 3 USCMA 143, 11 CMR 143 (1953); *United States v. Eggers*, 3 USCMA 191, 11 CMR 191 (1963).

[17] *United States v. Greer*, 3 USCMA 576, 13 CMR 132 (1953).

[18] *United States v. Musguire*, 9 USCMA 67, 25 CMR 329 (1958); *cf. United States v. Jordan*, 7 USCMA 452, 22 CMR 242 (1957) (urine specimen). Manual for Courts-Martial, 1969 (Rev.), para 152, authorizes taking a sample of blood for chemical analysis when there is a clear indication that evidence of crime will be found, there is reason to believe that delay will threaten the destruction of the evidence, and the method of conducting the search is reasonable. Whether this provision, which seems to be based on *Schmerber v. California*, 389 U.S. 757 (1966), can be reconciled with the interpretation given Article 31 by the Court of Military Appeals remains to be determined.

[19] *Cf. Schmerber v. California, supra; Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

[20] Manual, *supra*, para 151*c*.

[21] Manual for Courts-Martial, 1969 (Rev.), para 150*b*; *United States v. Kauffman*, 14 USCMA 283, 297, 34 CMR 63, 77 (1963); *United States v. Smith*, 9 USCMA 240, 26 CMR 20 (1958).

[22] *See, e.g.*, cases cited in *United States v. Kauffman, supra*, and *United States v. Smith, supra. See also Minor v. United States*, 396 U.S. 87 (1969).

[23] *See United States v. Gibson*, 3 USCMA 746, 14 CMR 164 (1954).

[24] 110 U.S. 516 (1884).

[25] 10 U.S.C. 832 (1964).

cross-examine witnesses, the accused is in a considerably better position than the defendant in a State or Federal civil court would usually be—especially if that defendant had been arrested on the basis of an indictment and there was no preliminary hearing as to probable cause.

Critics correctly point out that a commander is not bound by the recommendations of the officer who conducts the Article 32 investigation. However, before referring the charges for trial by general court-martial, the convening authority must submit them to his staff judge advocate for consideration and advice; and also the convening authority must have "found that the charge alleges an offense . . . and is warranted by evidence indicated in the report of investigation."[26] In view of the increasing complexity of military justice, it seems unlikely that many commanders will rashly proceed to refer to trial charges which are obviously baseless. And if a legal basis exists for the charges, it does not seem inappropriate to have the commander—who bears a considerable responsibility to maintain discipline [27]—decide whether the seriousness of the offense justifies trial by general court-martial. Probably the greatest possibility of abuse exists when a convening authority is not clearly informed by his staff judge advocate that the evidence disclosed by the Article 32 investigation does not support the charges.

IV. UNREASONABLE SEARCH AND SEIZURE

Although the Uniform Code made specific provision for some of the safeguards—such as the protection against self-incrimination and against former jeopardy—contained in the Bill of Rights, it does not deal expressly with unreasonable search and seizure. However, Manuals for Courts-Martial, long prior to the Code, prohibited use of evidence obtained by unlawful searches and seizures. Thus, military justice employed the exclusionary rule before the Supreme Court applied it to the States in *Mapp v. Ohio*.[28]

Off-post, at least in the United States, the house or property of a serviceman is subject to search only under the same rules that apply to a civilian.[29] On-post a commander may authorize search in connection with investigation of a crime; but he must have probable cause for doing so.[30] The criticism has been voiced that the commander is not a "neutral and detached magistrate" who will issue that warrant.[31] Of course, change in the willingness to issue warrants may result from continued upgrading of the quality and training of magistrates in the Federal and State systems.

On the other hand, judicial scrutiny of the affidavits on which warrants have been issued has become a major deterrent to the promiscuous issuance of warrants—or, at least, to the admission of evidence seized in searches predicted on those warrants.[32] To require similar affidavits in connection with military searches might provide a more reliable basis for reviewing the determination of military commanders that probable cause existed for making those searches;[33] and steps have already been taken in this direction.[34]

Proposals have been made that in military justice searches and seizures should only be authorized by "military judges."[35] The limited number and availability of the military judges would present some practical

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[26] Article 34, UCMJ, 10 U.S.C. 834 (1964).

[27] A commander may himself be punished for failure to maintain proper discipline over his troops. In re *Yamashita*, 327 U.S. 1 (1946).

[28] 367 U.S. 643 (1961).

[29] *Cf.* Manual, *supra*, para 152.

[30] *Ibid. United States v. Brown*, 10 USCMA 482, 28 CMR 48 (1959).

[31] *See, e.g., Johnson v. United States*, 333 U.S. 10 (1947); *Giordenello v. United States*, 357 U.S. 480 (1958).

[32] *Spirelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

[33] *United States v. Martinez*, 16 USCMA 40, 36 CMR 196 (1966) suggests that authority to search be in writing and spell out the facts upon which the authorization is based and enumerate the articles to be seized.

[34] *See, e.g.*, AF Form 1176, "Authority to Search and Seize."

[35] S. 4191, 91st Cong., 2d Sess., introducted by Senator Bayh; *see* 116 Cong. Rec. S 12862, 6 Aug 1970.

problems in implementing such proposals.[36] If, however, an affidavit were to be required by military law in connection with authorizing a search and seizure—in the same circumstances in which a warrant and supporting affidavit would be required in civilian life—likelihood of indiscriminate searches would be substantially reduced. Furthermore, the authorization to search should be in writing—with reasonable particularization of the place to be searched and the objects being sought. Of course, authorization for a search should not be required in situations—such as those involving vehicles or searches incident to arrest—where a search warrant would not be necessary in civilian life.

There have been criticisms of "shakedown inspections," whereby a general inspection is made of a barracks or other area. In the analogous situation of an administrative inspection in civilian life, the Supreme Court now requires court authorization;[37] but the requirements for obtaining such an order are less stringent than those for obtaining a warrant to search for evidence of crime. Moreover, even in military law the shakedown cannot properly be used as a subterfuge to avoid the requirement of probable cause to search for the evidence of a specific crime.[38]

For arrest—the seizure of the person which in military justice is denominated "apprehension"—the criterion applied by Article 7 of the Uniform Code is "reasonable belief that an offense has been committed and that the person apprehended committed it."[39] Thus, the requirements of probable cause for arrest established by the Fourth Amendment have been made applicable to military personnel. Equally applicable are the limitations on search incident to arrest as enunciated in *Chimel v. California*.[40]

As in the case of the on-post search, it might be desirable for military justice to provide for apprehension on the basis of an affidavit establishing probable cause and a written authorization for law enforcement agents to seize the accused. However, the absence of such a procedure does not seem especially significant when it is recalled that in civilian life a high percentage of arrests are made by the police on sight without an arrest warrant.

The Supreme Court has now proscribed many forms of electronic surveillance—even though only conversation is being "seized."[41] Years ago the Court of Military Appeals ruled that Section 605 of the Communications Act,[42] which prohibited wiretapping, did not apply extraterritorially or to base telephone systems;[43] and that wiretap evidence obtained overseas or from a military telephone system was admissible. Under that view service personnel would be more exposed than civilians to electronic surveillance. Whether the Court of Military Appeals would reach the same conclusion in light of recent Supreme Court decisions[44] and the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968[45] is unclear. And the question has been made somewhat academic by the limitations that the Armed Services have imposed on electronic surveillance.[46]

V. RIGHT TO COUNSEL

Due largely to Senator Ervin's efforts in obtaining enactment of the Military Justice Act of 1968, the availability of counsel to assist an accused at trial by court-martial is at least as great as in Federal or State courts. Indeed, under the "petty offense" ex-

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[36] It would seem quite appropriate, however, to empower military judges to issue search warrants as part of the process of expanding their power and prestige.

[37] *Camara v. Municipal Court*, 387 U.S. 523 (1967).

[38] As to shakedown inspections, *see United States v. Gebhart*, 10 USCMA 606, 28 CMR 172 (1959).

[39] 10 U.S.C. 807 (1964).

[40] 395 U.S. 752 (1969).

[41] *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

[42] *United States v. Gopaulsingh*, 5 USCMA 772, 19 CMR 68 (1955).

[43] *United States v. Noce*, 5 USCMA 715, 19 CMR 11 (1955).

[44] *Supra*, note 41.

[45] 82 Stat. 197.

[46] *See* "Use of Wiretapping and Eavesdropping in Conduct of Investigations," AFR 124-18, 23 Jul 1970; Early, *Interception of Communications by Air Force Agents*, 10 AFJAG L. Rev. (No. 1), Jan-Feb 68 at 8.

ception which now seems to be recognized as to trials in civil courts, there may be situations when a serviceman will be furnished an attorney in a court-martial when he would not be provided with counsel if tried in a civil court. Furthermore, unlike the civil courts, a serviceman need not assert poverty in order to receive counsel without expense to him; and the military defense counsel is not serving without adequate compensation, as is true of the lawyers appointed to defend indigents in some States.

Therefore, in appraising the manner in which military justice assures the right to counsel, the issue becomes the quality of the counsel furnished, rather than the availability of counsel. Because of the great difficulty which the Armed Services encounter in obtaining career judge advocates under present conditions, the lawyer furnished to a military accused as his appointed counsel in a court-martial will often be young and without great experience. Even so, he may be at least as experienced and proficient as the young lawyers who are assigned to defend indigents in some State and Federal courts. Moreover, he often will be more informed of recent developments in the field of criminal procedure than are many senior attorneys who have not had time to keep up with the cases.

As the civil courts rely increasingly on public defender and voluntary defender systems, the quality of representation of indigents in those courts will probably improve. Hopefully there will also occur improvements in the pay and other circumstances of military lawyers which will lead to a higher retention rate and a commensurate rise in the experience level and proficiency of appointed military defense counsel.

It should also be remembered that a military accused may, at his own expense, retain civilian counsel. That this right is not meaningless, even when a serviceman is stationed in some remote location, has been demonstrated by the recent participation of celebrated civilian counsel in court-martial cases.

The availability of counsel in military justice does not end with the trial. If the sentence includes a punitive discharge or confinement for as much as one year, qualified appellate defense counsel are provided to assist the accused—and again without any requirement that he show indigency. Moreover, this counsel is furnished without cost a verbatim transcript of the trial. While the counsel who was appointed to represent the accused at trial would not normally be serving as his appellate defense counsel, appeal is on the record; and there would be little, if any, disadvantage to the appellate counsel because he had not participated at the trial.

Although generally military defense counsel are not in a position to attack court-martial action collaterally in a Federal District Court or in the Court of Claims, they can participate in collateral attacks permitted within the system of military justice. And these remedies must usually be exhausted before resort to the civil courts.[47] While there may be some reason to broaden the Criminal Justice Act to provide civilian counsel to aid military accused in undertaking appropriate collateral attacks in the civil courts, the present inability of military counsel to participate therein is not a significant defect in military justice.[48]

Critics of military justice have expressed special concern about the independence of military defense counsel and have urged that, despite the recent strengthening of Article 37 of the Uniform Code,[49] military defense counsel need further protection from retaliation by military superiors if they prove successful in defending accused persons. Such retaliation, it is supposed, might relate to promotion, assignments, retention on duty, or other matters of considerable importance to a military lawyer.

Perhaps military defense counsel cannot be fully insulated from all conceivable military pressures. Even if the defense counsel

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[47] *Noyd v. Bond*, 395 U.S. 683 (1969).

[48] Senator Bayh has also proposed that military counsel be authorized to undertake collateral attacks in the civil courts in behalf of the accused whom they have represented before courts-martial. 116 Cong. Rec. S 12862, 6 Aug 1970.

[49] *See* the Military Justice Act of 1968, 82 Stat. 1355.

are placed outside the command of any officer who convenes courts-martial, they will still be dependent for promotion, retention, and assignments on superior officers within the Armed Services; and the fear might always exist of retaliation for defending an accused too vigorously. However, to put the problem in perspective, it should be noted that defense counsel in civil courts are also not wholly immune from various types of temptations and pressures—social, economic, and otherwise. Thus, the lawyer who defends an unpopular client may fear economic harm through loss of his other clients. Or, in other cases, he may choose to plead his client guilty after a hasty conference so that he may collect a fee for his services with a minimum of effort.

In military justice the accused who is concerned about the independence of his appointed military counsel may request that a military defense counsel be assigned from another command—or even from another command—or even from another Armed Service. If he has funds, he may obtain civilian counsel. These rights, together with the strengthened prohibitions against command influence on defense counsel and the increasing professionalization and independence of judge advocates, provide substantial protection against command influence on defense counsel.

VI. RIGHT TO BAIL

In civil life counsel for a defendant is usually concerned to have low bail set for his client and to assure that he remains free until trial takes place. While military law does not make provision for bail bond as such, the initial comparison may be misleading. In the first place, the Federal courts, pursuant to the Bail Reform Act of 1966,[50] have been moving away from reliance on bail and are using other means to assure that the defendant is present for trial. Some States are adopting a similar approach, and thereby eliminating abuses associated with bail bond and bail bondsmen. Secondly, military justice is oriented by statute and by regulation to the minimization of pretrial confinement or restraint;[51] and the criteria used in this regard are similar to those used in civil courts in determining whether to release on recognizance.[52]

The Military Justice Act of 1968 authorized deferment of confinement in suitable cases,[53] and thereby it provided for the first time a sort of military equivalent to the civilian bail pending appeal of a conviction. It might be desirable if the military judge and The Judge Advocate General also had statutory authority to defer confinement.[54]

VII. DISCOVERY

Some constitutional basis clearly exists for a defendant's obtaining certain vital information from the prosecution about its case.[55] However, military justice goes far beyond any minimum that is now held to be constitutionally required; and, indeed, it authorizes far broader discovery than is available to a defendant in most civil courts. Moreover, obtaining such discovery does not subject the accused to discovery by the prosecution, as would be true under Federal Rule 16 of Criminal Procedure and under the holdings in some States.[56] There is no notice requirement for an insanity or alibi

[50] 80 Stat. 214.

[51] *See, e.g.*, Articles 10, 13, Uniform Code of Military Justice, 10 U.S.C. 810, 813; Manual for Courts-Martial, 1969 (Rev.), paras 20*c*, 22, 30*h*. Military justice does not provide any specific authority for preventive detention, pretrial confinement being permitted only when "deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged." Manual, para 20*c*.

[52] Senator Bayh and others have proposed that, as in Federal civil courts, military justice provide that an accused receive credit on his sentence to confinement for any time that he has spent in pretrial confinement. 116 Cong. Rec. S 12682, 6 Aug 1970.

[53] Article 57(d), 10 U.S.C. 57(d).

[54] Senator Bayh has proposed transferring this authority to the military judge; he also would authorize the military judge to suspend sentences.

[55] *Brady v. Maryland*, 373 U.S. 83 (1963).

[56] The Supreme Court's recent upholding of a State requirement that a defendant give notice of an alibi defense tends to uphold the constitutionality of allowing certain discovery in behalf of the Government. *See Williams v. Florida*, 399 U.S. 78 (1970).

defense, as exists in some jurisdictions. On balance, the rules as to discovery seem very favorable to the military accused—except for the unusual cases where executive privilege or security restrictions hamper his access to information.[57]

VIII. SPEEDY TRIAL

The constitutional right to a speedy trial, which the Supreme Court has applied to both Federal and State trials,[58] is fully recognized by the Uniform Code;[59] and the Court of Military Appeals has ordered dismissal of charges where trial was unduly delayed.[60]

In practice, it seems clear that the right to speedy trial is far better implemented in military justice than in the civil courts. The delays in trial by court-martial have not been measured in years, as has sometimes been true in the civil courts.[61] Nor has there been any occasion for warning that delay and congestion may produce the collapse of the entire system of military justice.[62]

IX. DOUBLE JEOPARDY

The protection against double jeopardy granted by the Fifth Amendment and applied fully by the Supreme Court to the States[63] is also guaranteed to a military accused by the Uniform Code.[64] Indeed, the Code's limitation on sentence in the event of a rehearing[65] provides greater protection to the accused than is available in civil courts.[66]

It is still unclear whether, under the Supreme Court's current view of double jeopardy, the same act or transaction can be prosecuted both in a State court and in a Federal District Court. The eclipse of the dual-sovereign approach to this type of problem might suggest a negative answer.[67] Since a court-martial is a Federal tribunal, a military accused cannot be prosecuted both in a Federal District Court and in a court-martial for the same act.[68] And, as to prosecution in both a court-martial and a State court, the rule would presumably be the same as for dual prosecution in a State court and a Federal District court. Interestingly, some treaties, such as the NATO Status of Forces Agreement,[69] have long protected the serviceman overseas against prosecution for the same act in both a court-martial and a foreign court.[70]

Admittedly the serviceman is especially vulnerable to certain collateral consequences by reason of conviction in a civil court. For one thing, if the conviction is for a serious offense he may be administratively discharged as undesirable with a resultant stigma probably equal to that created by a punitive discharge. Secondly, if confined by civil authorities in connection with a civil court conviction, he may be considered absent without leave by reason of the time he is away from his post in the hands of civil

[57] Manual for Courts-Martial, 1969 (Rev.), para 151*b*. Thus, the contents of OSI reports are not normally subject to discovery.

[58] *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

[59] *See, e.g.*, Articles 10, 33, 98, 10 U.S.C. 810, 833, 898; Manual for Courts-Martial, 1969 (Rev.), paras 68*i*, 215*e*.

[60] *See, e.g., United States v. Williams*, 16 USCMA 589, 37 CMR 209 (1967).

[61] *See, e.g., Dickey v. Florida*, 398 U.S. 30 (1970).

[62] Chief Justice Burger gave such a warning with respect to the civil courts in his "State of the Judiciary" address at the American Bar Association meeting in St. Louis on 10 Aug 1970. There are many other less official warnings of the problems of delay in the civil courts.

[63] *See, e.g., North Carolina v. Pearce*, 395 U.S. 711 (1969).

[64] Articles 44, 63, 10 U.S.C. 844, 863.

[65] Article 63, 10 U.S.C. 863.

[66] Under *North Carolina v. Pearce, supra* note 63, a heavier sentence can be imposed at a retrial under very limited conditions; the Code's limitation is absolute with respect to rehearings.

[67] *See, e.g., Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

[68] *Grafton v. United States*, 206 U.S. 333 (1907).

[69] Art. VII, para 8.

[70] In practice, the Armed Services impose severe limitations on prosecution in a court-martial for the same transaction which has already been the subject of prosecution in a State court. Senator Bayh would impose a statutory prohibition on a retrial by court-martial for "substantially the same offense" which has been tried in a State or Federal Court. *See* sec. 844, Art. 44, of S. 4191, 91st Cong., 2d Sess.

authorities.[71] However, it should be recalled that in civil life it is not unknown for loss of voting rights and the license to engage in certain professions and occupations to result from a civil court conviction. For an alien the consequences may even include deportation.

X. CONFRONTATION

Military justice recognizes the right of confrontation and now holds it to involve more than the opportunity for cross-examination.[72] At one time the Government was permitted to use depositions against the accused under circumstances that had little, if any, parallel in civil courts; but the Court of Military Appeals, reversing its earlier position, imposed substantial limitations on this practice and required that the accused be present when the deposition was taken.[73] Under proper circumstances, and in the accused's presence, the Government still may take the deposition of a witness who may be unavailable for the trial; but this procedure, however unfamiliar in civil courts, is not unreasonable.

In courts-martial there is frequent reliance on documentary evidence, which is offered under the official records or business entries exceptions to the hearsay rule.[74] While this practice reduces the need for live testimony and thereby diminishes the accused's opportunity for confrontation, the evidentiary principles involved are not unique to military law—even though in the military context there may be greater occasion for their use. In a few instances the use in evidence of greatly delayed entries in official records has posed a real question of violation of the right to controntation.[75]

XI. NOTICE OF CHARGES

Critics of military justice, including Mr. Justice Douglas in the *O'Callahan* case,[76] have made much of alleged unconstitutional vagueness in Articles 133 and 134 of the Uniform Code. The former punishes conduct unbecoming an officer and gentleman; the latter is the general article, which proscribes conduct that is service-discrediting, to the prejudice of good order and discipline in the Armed Forces, or non-capital crimes and offenses prohibited by other Federal statutes.

Over the years these articles and their predecessors have been upheld by the Supreme Court and other tribunals; and a persuasive argument can be made that they are not unconstitutionally vague[77]—especially as construed by the Court of Military Appeals.[78] More than 50 form specifications contained in an Appendix to the Manual for Courts-Martial,[79] which is itself published by Executive Order and is probably more readily available for inspection by military personnel than State and Federal criminal codes are available to the general public, give considerable notice of the conduct which is prohibited by Article 134. A chief problem in connection with these two articles lies in the occasional effort to push them to—and perhaps sometimes beyond—the breaking point.[80]

XII. OBTAINING WITNESSES

The right to compulsory process for obtaining witnesses, which is granted by the Sixth Amendment, has been implemented by Articles 46 and 47 of the Uniform Code. Unlike the subpoena available from a State

[71] Manual for Courts-Martial, 1969 (Rev.), para 165. The provisions of S. 4191, *supra* note 70, would apparently not preclude such prosecution for unauthorized absence.

[72] *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960).

[73] *Ibid. See also* Everett, *The Role of the Deposition in Military Justice*, 7 Military L. Rev. 131 (Jan 1960).

[74] Manual for Courts-Martial, 1969 (Rev.), para 144.

[75] *See, e.g., United States v. Wilson*, 4 USCMA 3, 15 CMR 3 (1954).

[76] 395 U.S. 258 (1969).

[77] Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 Am. Bar. J. 357 (1968).

[78] *United States v. Frantz*, 2 USCMA 161, 7 CMR 37 (1964); *United States v. Sadinsky*, 14 USCMA 563, 34 CMR 343 (1964); *United States v. Howe*, 17 USCMA 165, 37 CMR 429 (1967). *See also* Manual for Courts-Martial, 1969 (Rev.), para 213*b*.

[79] Manual, *supra*, App. 6c, Form Specifications 126–188.

[80] *See* Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C.L. Rev. 142 (1959).

court, the process is not limited by State boundaries. Of course, for courts-martial convened overseas the availability of civilian witnesses will often depend in part on the cooperation of the host countries.

Admittedly the prosecution may obtain some discovery of the defense by means of the information furnished by defense counsel to support a request that a witness be subpoenaed. However, in light of the discovery now available to the military accused in courts-martial and the growing acceptance of the view that the Government should be entitled to discovery,[81] it does not seem that the accused is prejudiced by explaining the materiality of the witness whom he wishes subpoenaed at Government expense.

XIII. PUBLIC TRIAL

The constitutional right to a public trial is protected by the provisions of the Manual for Courts-Martial[82] and by the decisions of the Court of Military Appeals.[83] While spectators may be excluded from an entire trial, over the accused's objection, to prevent the disclosure of classified information, such situations appear to be rare. Other instances of exclusion of a part of the public, or exclusion of the spectators from part of the trial seem to be authorized by precedents from the civil courts.[84]

XIV. IMPARTIAL JURY

The Sixth Amendment guarantees an impartial jury; and the Supreme Court has labored over the years to implement that guarantee. Moreover, Congress has enacted the Jury Selection and Service Act of 1968[85] with a view to enhancing the impartiality and fairness of Federal juries.

However, there can be significant differences of opinion as to the value and proper role of juries. For example, the Founding Fathers did not require jury trial for cases arising in the Armed Forces. Nor is a jury trial required in either Federal or State courts for "petty offenses"—apparently those offenses for which the punishment imposable does not exceed 6 months' imprisonment.[86] In the Federal courts the jury plays no role in sentencing, except in capital cases; in some States juries impose many sentences. The States may set their own qualifications of intelligence, good reputation, and the like with respect to jury service.[87] Furthermore, the requirement of jury trial under the Sixth Amendment does not signify a 12-man jury; a jury of smaller size is also permissible.[88]

As to the required unanimity of a jury verdict, it should be remembered that this is demanded for acquittal as well as conviction; and mistrials have occurred because "holdout jurors" would not vote to acquit. Nor are juries in civil courts always immune from prejudice and pressure. Moreover, in civil courts delay and congestion have sometimes induced indiscriminate negotiation of guilty pleas, with the concomitant waiver of defendant's right to jury trial.

In light of this discussion of trial by jury in the civil courts, some of the criticisms of courts-martial can be evaluated more realistically. For example, there have been complaints that the members of a court-martial are not a representative cross-section of the military community, since usually they are officers.[89] However, some of the jury qualifications applicable in civil trials may lessen the representativeness of the jury without necessarily impairing the fairness of the verdicts reached. Similarly, there is no adequate

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[81] *Cf. Williams v. Florida*, 399 U.S. 78 (1970).

[82] Manual for Courts-Martial, 1969 (Rev.), para 53*e*.

[83] *United States v. Brown*, 7 USCMA 251, 22 CMR 41 (1956).

[84] Some of the civilian precedents are cited in *United States v. Brown, supra*. An interesting issue as to whether an Article 32 investigation may be closed to spectators has been raised in connection with the pretrial investigation of the murder charges against Army Lieutenant McDonald at Fort Bragg, North Carolina.

[85] 82 Stat. 53.

[86] *Baldwin v. New York*, 399 U.S. 66 (1970).

[87] *Carter v. Jury Commissioners*, 396 U.S. 320 (1970).

[88] *Williams v. Florida*, 399 U.S. 78 (1970).

[89] Article 25(c)(1) of the Uniform Code authorizes an enlisted man to request enlisted membership on the court-martial, in which event at least one-third of the membership must be enlisted personnel. This option is not used very frequently.

showing that courts-martial convict the innocent more readily than do civil juries. That courts-martial have a higher rate of convictions to cases tried than some civil courts have does not prove that courts-martial convict the innocent. Instead such a statistic might only reflect careful pretrial screening of cases in military justice, or a different composition of caseloads, or excessive acquittals of guilty persons by the civil courts.

Perhaps courts-martial composed only of officers are more prone to impose heavy sentences than would result if these courts-martial had a substantial membership from the lower enlisted grades. However, sentencing is not a jury function in the Federal courts or in most States; and while sentences in civil courts might become more lenient if imposed by a jury representing a cross-section of the community, it is not generally conceded that such a sentencing procedure would be desirable.

While there are various ways in which trials by court-martial could be cut more to the pattern of trials in the civil courts, it is quite likely that significant countervailing costs would be incurred. And these costs would not necessarily be measured solely in loss of military efficiency and effectiveness. For example, they might also be in the form of congestion and delay in trials—such as that which apparently characterizes many civil courts today and impairs defendants' rights to speedy trial.

In weighing criticisms of military justice, there should also be noted the significant improvements that have been achieved by the Military Justice Act of 1968. Article 37's prohibition against command influence on courts-martial was strengthened. A better procedure was provided for handling challenges for cause. And the accused was given the election to select trial by an independent military judge.[90] By using this option, he can assure that the trier of fact is not subject to command influence of the convening authority.

There have been proposals that the members of courts-martial be chosen at random from a roster in order to prevent a commander from "stacking" the court.[91] While this provides an additional safeguard, problems might develop when the persons designated by chance for court membership were needed elsewhere for pressing military tasks. Moreover, such a change would do little to satisfy the critics of military justice unless the court members were chosen from an entirely different military command, since they would still be under the command of the convening authority. Of course, choosing the members from a different command would often heighten the disruption of military activities, increase the costs of trial, and enhance the possibilities of delay in convening the court-martial.

Other proposals for change would require that court-martial members be selected from a cross-section of the military community—all grades and ranks—and would thus seek to make the court-martial more like a civilian jury. Of course, if convening authorities are the malevolent creatures pictured by some critics of military justice, there would be no assurance that an airman or private would be more willing than officers to defy their commanders' vengeance in the event of acquittals or light sentences for the accused. Further, there is the obvious question as to whether the court-martial membership should include persons junior in rank or grade to the accused being tried, or whether instead it should be composed only of persons senior to the accused and thereby be a less representative cross-section of the military community. Finally, one can only speculate as to what the effects might be on the fairness and impartiality of a court-martial if the disparity in grade between the senior and junior members of the court-martial were in-

[90] This election of trial by military judge alone does not require the consent of the Government, as is required in the Federal District Courts under Federal Rule 23 of Criminal Procedure. The Uniform Code does not provide a procedure whereby an accused can elect to be sentenced by the military judge after being found guilty by the members of the court-martial. Perhaps it would be desirable to allow the accused some means for retaining his "trial by jury" while at the same time being sentenced by a judge.

[91] Senator Bayh has made this proposal. *See* 116 Cong. Rec. S 12862, 6 Aug 1970; and S. 4191, 91st Cong., 2d Sess., sec. 825.

creased by broadening the membership from enlisted men in the lower grades. Would an airman or private be more likely or less likely than a lieutenant to give weight to the views of a colonel or major who was also a member of the court-martial? Would there be claims that the lower ranking members of the court-martial were unconsciously intimidated by the higher rank of other members of the court-martial? In short, there may be some basis for doubt that broadening the base of court-martial membership would produce fairer findings and sentences.

XV. INDEPENDENT JUDGE

Article III of the Constitution seeks to assure the independence of the Federal judiciary; and a major criticism of military justice has been that the accused does not receive the benefits of trial before a judge whose independence is assured by life tenure.[92] However, even in the State courts life tenure usually has not been granted to judges, who instead may be subject to the subtle pressures involved in being compelled to seek election and reelection to office.

Over the years the opinions of the Court of Military Appeals analogized the "law officer" of a general court-martial to a Federal judge. The Military Justice Act of 1968 has moved in this same direction by providing a firm statutory basis for the military judiciary and by assuring its independence of command influence. The availability of the accused's election to be tried by military judge—an election which does not require the Government's consent—is an important safeguard against any hazard of command influence.

In line with the objective of enhancing the prestige and independence of military judges, it would seem appropriate to extend the All Writs Act to apply specifically to them;[93] empower military judges to authorize searches and seizures upon the basis of an affidavit establishing probable cause; allow them to release from pretrial confinement or to defer confinement pending appeal; authorize them to suspend sentences in cases where the accused elects to be tried by the military judge; and grant military judges expanded power to punish for contempt. There have also been proposals that Article 26 of the Uniform Code should be amended to allow either civilians or commissioned officers to serve as military judges, just as Article 66 of the Code allows either civilians or commissioned officers to be "appellate military judges." However, while further improvements may be made in the military trial judiciary, it seems clear that military judges already are making a substantial contribution to providing fair and impartial trials for servicemen.

XVI. CRUEL AND UNUSUAL PUNISHMENT

The constitutional prohibition against cruel and unusual punishment is paralleled in Article 55 of the Uniform Code. Just as there have been problems in many civilian prisons, military confinement facilities have not been beyond reproach. On the other hand, some of the military facilities—especially the Air Force's 3320th Retraining Group—have pioneered, with impressive results, in the rehabilitation of convicted offenders. While considerable improvement might be made in military custodial facilities if additional appropriations were available from Congress, there is no proof that the Armed Services are less obedient than others to the constitutional injunction against cruel and unusual punishments.

XVII. APPELLATE REVIEW

Appellate review of criminal convictions is not provided for in the Bill of Rights; but clearly it is an important means for the safeguarding of constitutional rights. Thus, the several levels of appellate review which

[92] *See Toth v. Quarles*, 350 U.S. 11, 15 (1955); *Reid v. Covert*, 354 U.S. 1, 36 (1955).

[93] While it has been held that the All Writs Act, 28 U.S.C. 1651, applies to the Court of Military Appeals and to the Court of Military Review, there is not yet any authoritative precedent to the effect that this Act applies to the military judges. *See United States v. Gagnon*, Misc. 70-2 (AFCMR 14 Apr 1930). Senator Bayh's proposed S. 4191, 82d Cong., 2d Sess., would grant this authority to military judges. Sec. 826(b).

the Uniform Code provides for serious cases are significant in protecting the constitutional rights of military personnel. In connection with such review, the accused is furnished military appellate defense counsel and a verbatim transcript of the trial proceedings without cost to him and without a showing of indigency on his part. Moreover, up through the Court of Military Review, the review extends to fact as well as law and includes the appropriateness of sentence.

In light of these safeguards, the accused receives greater protection on appellate review than is available in either Federal or State civil courts. While there now exists no provision for direct appellate review of the Court of Military Appeals by the Supreme Court,[94] there are routes of collateral attack which culminate in the Supreme Court.

XVIII. CLOSING OBSERVATIONS

As in any other system, the fairness of military justice will depend on the caliber and integrity of the people who administer it. Some of the critics of military justice have such intense distrust of the persons administering military justice that they will never be convinced of the system's fairness. However, the more objective observer would probably conclude that progress is accelerating in improving the professional quality of military lawyers and eradicating from the military establishment any entrenched attitudes that might conduce to command influence on court personnel. One unfortunate adverse factor in improving military justice is the constant attrition of experienced judge advocates—an attrition which results in part from the lack of compensation for military lawyers commensurate with that available in private practice or in other Government service.

Military justice is not perfect and merits further scrutiny and possible change. Sometimes there is undue defensiveness with respect to proposals for change. On the other hand, many of the criticisms of military justice recently voiced—including that by Mr. Justice Douglas in *O'Callahan*—have been so extreme and unfounded that they tend to destroy any climate in which constructive change can occur.

[94] For a discussion of collateral attack on court-martial action, *see* Everett, *Collateral Attack on Court-Martial Convictions*, XI JAG L. Rev. 399 (Fall 1969). S. 4191, *supra* note 93, would also authorize the Supreme Court to review cases in the Court of Military Appeals upon writ of certiorari.