PERSPECTIVE

MILITARY JUSTICE IN THE WAKE OF PARKER V. LEVY

Robinson O. Everett

June is an important month not only for weddings but also for pronouncements by the Supreme Court on important matters of military criminal law administration. On June 2, 1969, the Court held in O'Callahan v. Parker that, at least within the United States and in peacetime, a court-martial may not try a serviceman for conduct which is not service-connected. On June 25, 1973, the Court decided Gosa v. Mayden which concerned the retroactivity, if any, of O'Callahan. Then, on June 19, 1974 the Court ruled in Parker v. Levy, which involved an attack on Articles 133 and 134 of the Uniform Code of Military Justice as unconstitutionally vague.

When these three cases are read together, the change of the Court's approach to military justice that has occurred in the past five years is striking. In O'Callahan, Justice Douglas, writing for the Warren Court, recognized the need for specialized military courts but reiterated the admonition from Toth v. Quarles that because of "dangers lurking in military trials ... free countries have tried to

---

* This article is an edited version of Professor Everett's remarks on the occasion of the Third Annual Edward H. Young lecture on Military Legal Education at The Judge Advocate General's School on September 17, 1974. The opinions expressed are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** Professor of Law, Duke University School of Law.

restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintain discipline among troops in active service." The opinion noted that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law" and referred to "so-called military justice" and "the travesties of justice perpetrated under the "Uniform Code of Military Justice".”

In Gosa v. Mayden, Justice Blackmun wrote for a plurality that included the Chief Justice and Justices White and Powell. While recognizing that military justice does not afford rights to grand jury indictment and trial by jury, the opinion of Justice Blackmun concluded that the absence of these protections does not require retroactive application of O'Callahan—a case which was described as "a clear break with the past.” Indulging in understatement, Justice Blackmun conceded that "the opinion in O'Callahan was not uncritical of the military system of justice and stressed possible command influence and the lack of certain procedural safeguards"; but he added that "the decision there, as has been pointed out above, certainly was not based on any conviction that the court-martial lacks fundamental integrity in its truth-determining process.” At this point an interesting footnote states:

There are some protections in the military system not afforded the accused in the civilian counterpart. For example, Art. 32 of the Code, 10 U.S.C. § 812, requires "thorough and impartial investigation" prior to trial, and prescribes for the accused the rights to be advised of the charge, to have counsel present at the investigation, to cross-examine adverse witnesses there, and to present exonerating evidence. It is not difficult to imagine, also, the situation where a defendant, who is in service, may well receive a more objective hearing in a court-martial than from a local jury of a community that resents the military presence.

Mr. Justice Rehnquist concurred in the judgment in Gosa with an opinion announcing that "O'Callahan was, in my opinion, wrongly

8 395 U.S. at 264.
9 Id. at 265.
10 Id. at 266.
11 350 U.S. at 672. This is the same phrase employed by Mr. Justice Stewart in Desist v. United States, 394 U.S. 244, 248 (1969), which also involved a retroactivity issue.
12 413 U.S. at 680.
13 Id. at 680-1.
14 Id. at 681. For other comment on the safeguards available in courts-martial see Everett, The New Look in Military Justice, 1973 Duke L. J. 663-697.
decided, and I would overrule it for the reasons set forth by Mr. Justice Harlan in his dissenting opinion" in that case.\textsuperscript{15}

In \textit{Levy}, Justice Rehnquist wrote an opinion that expressed the views of a five member majority. Captain Howard B. Levy, an Army doctor at Fort Jackson, South Carolina, was convicted by a general court-martial for violations of Articles 90, 133, and 134 of the Uniform Code and sentenced to dismissal, total forfeitures, and three years confinement.\textsuperscript{16} His Article 90 offense concerned disobedience of an order to train personnel in dermatology in preparation for their possible assignment to Vietnam. The offenses under Articles 133 and 134 concerned statements made by Captain Levy in the presence of enlisted personnel and others, expressing his strong opposition to the Vietnam war. The Court of Appeals for the Third Circuit had found Articles 133 and 134 void for vagueness.\textsuperscript{17}

In upholding the constitutionality of both Articles, Justice Rehnquist emphasized that "the military is, by necessity, a specialized society separate from civilian society"\textsuperscript{18} and that "military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."\textsuperscript{19} The opinion then cited several Supreme Court precedents from the nineteenth century which applied the statutory provisions that were ancestors of the present Articles 133 and 134.\textsuperscript{20} He continued:

The differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code.\textsuperscript{21}

The opinion adverts to a broader range of conduct regulated by the Uniform Code than is encompassed within civilian criminal codes but notes that the sanctions for minor offenses under Article 15 "are more akin to administrative or civil sanctions than to civilian criminal ones."\textsuperscript{22} Because of the differences between military and civilian communities, the Court concludes that "Congress is permitted to leg-
isolate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." 23 Thus, the Court stated that "the proper standard of review for a vagueness challenge to the Articles of the UCMJ is the standard which applies to criminal statutes regulating economic affairs." 24

In discussing the rights of service personnel, the Court made the following observations:

While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. 25

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it. 26

Several features of the majority opinion in Levy are noteworthy. In the first place, the Court goes much farther than would seem absolutely essential to the disposition of the vagueness challenge to Articles 133 and 134. In light of the interpretation of those Articles by the Manual for Courts-Martial 27 and by the Court of Military Appeals, 28 the Supreme Court could have concluded that the scope of the articles was sufficiently restricted and clarified. To apply to

23 Id. at 756.
24 Id.
25 Id. at 751.
26 Id. at 758.
27 See, e.g., paragraph 2138, Manual for Courts-Martial, 1969 (Rev. ed.) (hereinafter cited as Manual), which makes clear that the first clause of Article 134 "refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense." Also, in Appendix 6, the Manual prescribes sample specifications for alleging violations of Articles 133 and 134.
punitive articles affecting important personal rights and liberties of servicemen the same standard of review which applies to criminal statutes regulating economic affairs seems unnecessary. But, the Court chose to do this very thing. Second, the Court chose to rely on several precedents from the last century which had been little cited in recent years. Those cases arose at a time when the civilian courts would interfere with a court-martial only if the court-martial lacked jurisdiction, a term that was narrowly construed and did not include loss of "jurisdiction" in the sense of Johnson v. Zerbst.\textsuperscript{29} Third, the majority opinion did not reflect distrust of military justice manifest in O'Callahan.

Finally, although not referring to the all-volunteer Army, the reasoning of the majority appears to take cognizance of the movement away from the use of the draft. Possibly the Court felt that there may be more compelling constitutional reasons for protecting the rights of an inductee serving because of a "call" to duty than those of an enlistee, who freely chooses to enter military service and subject himself to military jurisdiction. In this regard, I am reminded of Justice Clark's suggestion in McElroy v. Guagliardo\textsuperscript{30} that problems of military jurisdiction over civilian employees outside the United States could be solved by having the employees agree to the exercise of such jurisdiction as a condition of their employment.

In view of its majority opinion, what does Levy portend? In recent years there has been extensive comment on the civilianization of military justice. Indeed, two years ago Professor Delmar Karlen delivered the Young lecture on this very topic and obviously did not feel that the trend was entirely healthy.\textsuperscript{31} I have written elsewhere about the extent to which military justice provides procedural safeguards that assure the same fairness of trial required in the civil courts.\textsuperscript{32} Clearly the majority opinion in Levy refutes the position that civilianization of military justice is constitutionally required. Unfortunately, at the same time the Levy decision may reduce some

\textsuperscript{29} 304 U.S. 458 (1938) (requiring appointment of counsel in federal prosecutions).


\textsuperscript{31} Karlen, Civilianization of Military Justice: Good or Bad, 60 Calif. L. Rev. 113 (1972).

\textsuperscript{32} See, e.g., Everett, supra note 14.
of the pressure for improvement of military justice that gave rise to the Uniform Code\textsuperscript{33} and to the Military Justice Act of 1968.\textsuperscript{34}

To what extent does \textit{Levy} signify the expansion or restriction of \textit{O'Callaban v. Parker}\textsuperscript{35}? Since Justice Rehnquist, who wrote the majority opinion in \textit{Levy}, had previously stated in his concurring opinion in \textit{Gosa} that \textit{O'Callaban} was erroneously decided and should be overruled, there is a possibility that \textit{O'Callaban} might be dealt a mortal blow. The delivery of the \textit{coup de grace} would be all the easier, since Justice Blackmun, writing the plurality opinion in \textit{Gosa}, had characterized \textit{O'Callaban} as "a clear break with the past"—one of his reasons for not granting it retroactivity. The Court could say that, in overruling \textit{O'Callaban}, it simply would be returning to earlier precedent, precedent that had been reaffirmed in \textit{Levy}. As one might recall, the Warren Court in \textit{Gideon v. Wainwright}\textsuperscript{36} disposed of \textit{Betts v. Brady}\textsuperscript{37} by recognizing that \textit{Betts v. Brady} was inconsistent with the earlier precedent of \textit{Powell v. Alabama}\textsuperscript{38}.

Instead of a full-fledged overruling of \textit{O'Callaban}, however, I suspect that we shall witness, at least for the present, a gradual erosion of its holding—as the \textit{Miranda}\textsuperscript{39} rule is being nibbled away by such decisions as \textit{Harris v. New York}\textsuperscript{40} and \textit{Michigan v. Tucker}\textsuperscript{41} \textit{Gosa} has already limited the impact of \textit{O'Callaban} by denying it retroactivity. I fully expect that the Supreme Court, recognizing the needs of the military community in an overseas milieu, will hold that \textit{O'Callaban} has no extraterritorial application—as the Court of Military Appeals and other courts have held.\textsuperscript{42} Similarly, the Supreme Court will probably follow the lead of the Court of Military Appeals and not extend \textit{O'Callaban} to petty offenses,\textsuperscript{43} where grand jury indictment and trial by jury are not constitutionally required in civilian courts. Petty offenses, incidentally, are the very types of offenses

---

\textsuperscript{33} Act of May 5, 1950, ch. 169, § 1, 64 Stat. 108 (codified at 10 U.S.C. §§ 801-940 (1958)).


\textsuperscript{35} 372 U.S. 335 (1963).

\textsuperscript{36} 316 U.S. 455 (1942).

\textsuperscript{37} 287 U.S. 45 (1932).


\textsuperscript{39} 401 U.S. 222 (1971).

\textsuperscript{40} 417 U.S. 433 (1974).

\textsuperscript{41} See authorities cited at note 3, supra.

that frequently are dealt with by Article 15 nonjudicial punishment, a fact which is adverted to in Justice Rehnquist's opinion in Levy.\textsuperscript{45}

What about cases involving marijuana and drug offenses, where the Court of Military Appeals has disagreed with some other federal courts on the existence of a "service-connection"? The Court of Military Appeals has taken the position that, because military efficiency might be adversely affected when a serviceman uses drugs, whether on or off a military base, service-connection exists.\textsuperscript{44} Several federal courts have concluded otherwise. They have held that off-base use—and perhaps even sale—of marijuana and drugs is not sufficiently service-connected to invest a court-martial with jurisdiction.\textsuperscript{45}

The Supreme Court has granted certiorari in Schlesinger \textit{v. Councilman},\textsuperscript{46} a case which presents some of these issues. Captain Councilman was court-martialized for the sale off-base of marijuana to an enlisted man. The court of appeals ruled that service-connection was lacking.\textsuperscript{47} However, the case may be decided by the Supreme Court not on the issue of jurisdiction of the court-martial, but instead on a procedural issue: the extent to which a federal court can intervene and enjoin a trial by court-martial.\textsuperscript{48}

Based on Levy, one can argue that, since military justice is so dis-


\textsuperscript{46} Councilman \textit{v.} Laird, 481 F.2d 613 (10th Cir. 1973), \textit{cert. granted sub. nom.,} Schlesinger \textit{v.} Councilman, 414 U.S. 1111 (1973). [After this speech was given and edited for publication, the United States Supreme Court decided Schlesinger \textit{v.} Councilman, 43 U.S.L.W. 4432 (U.S., March 25, 1975). (Ed. note)]

\textsuperscript{47} Councilman \textit{v.} Laird, 481 F.2d 613 (10th Cir. 1973).

\textsuperscript{48} The applicability of the exhaustion of remedies in seeking an injunction against court-martial for a drug offense has also been raised by the petition for certiorari in Macavage \textit{v.} Schlesinger, 43 U.S.L.W. 3109 (U.S. May 30, 1974) (No. 1795). The Court of Appeals concluded that an injunction should not be granted. Injunctive relief with respect to a court-martial proceeding is also involved in Lucas \textit{v.} DeChamplain, appeal filed, 43 U.S.L.W. 3046 (U.S. April 4, 1974) (No. 1346). Cf. Parisi \textit{v.} Davidson, 405 U.S. 34 (1972) (granting injunctive relief); Noyd \textit{v.} Bond, 395 U.S. 683 (1969) (applying an exhaustion requirement). \textit{See also} Everett, supra note 3, at 894-95.
tinctive and is subject to different standards than those which apply to civilian criminal trials, there is a special importance in maintaining the doctrine of O'Callahan. In short, the serviceman who is tried by court-martial may not be entitled under Levy to the protections that even some severe critics of O'Callahan thought were required in courts-martial proceedings.

On the other hand, the apparent diminution of the Supreme Court's distrust of military justice and its increased perception of the uniqueness of the military community and of military criminal codes will probably lead to an expansive view of what is service-connected. Moreover, this is an area in which the Supreme Court may defer to the supposed expertise of the Court of Military Appeals and the armed services themselves on the premise that they can better discern a service-connection than can an Article III court. As I have pointed out elsewhere, there is precedent in military law for a broad interpretation of service-connection.

Parallel arguments can be advanced concerning the right of federal tribunals to enjoin trials by court-martial when a defendant claims that service-connection is lacking. On the one hand, the potential difference in procedural safeguards between courts-martial and civil courts may be so great in light of Levy that federal district courts should be allowed to intervene at an early stage to enjoin trial when, under O'Callahan or otherwise, military jurisdiction seems lacking. Contrariwise, it can be contended that, because of the unique needs of the military community and of the operation of the military justice system, federal civil courts should not be allowed to enjoin any trial of a serviceman by court-martial. Noyd v. Bond is precedent for the requirement that the remedies authorized by the Uniform Code be exhausted before a service member is permitted entry into the civilian courts. Parisi v. Davidson allowed a trial by court-martial to be enjoined, but may be limited to a special situation—a conscientious objector who has sought to obtain his administrative release from the armed forces prior to the occurrence of the events leading to the charges against him.

On balance, I expect that the Supreme Court will virtually preclude federal district courts from enjoining trials by courts-martial. Among my reasons for this expectation are these: the Court's less-

41 Everett, supra note 3, at 870-872.
43 405 U.S. 34 (1972).
ened suspicion of the quality of military justice; its reduced enthusiasm for O'Callahan's restriction of military jurisdiction;\textsuperscript{53} the undesirability of adding further to the workload of the federal district courts; and a fear by the Supreme Court that enjoining trials by courts-martial might hinder the swift administration of justice, an important consideration in maintaining discipline in the armed services.

The majority opinion in Levy does not affirm that servicemen possess all the constitutional rights enjoyed by their civilian counterparts except those that are necessarily excluded by the needs of the military community. Furthermore, as to the important first amendment right of free speech—a right for which the Supreme Court has long demonstrated great solicitude—the majority in Levy provides a protection which is far less inclusive than that available to a civilian protesting restrictions on his free speech. Because of the unique needs of the military community and the importance of preserving the authority of military superiors, there may be reasons for permitting limitations on free speech in the military environment that would not be constitutionally permissible in the civilian community. But what of the other rights which, for civilians, are protected by the Bill of Rights?\textsuperscript{55}

Recently, the Army and Air Force concluded that under Argeringer v. Hamlin\textsuperscript{56} a summary court-martial could not impose a sentence to confinement unless lawyer-counsel was made available to the accused.\textsuperscript{55} The Navy took the opposite position and did not furnish counsel in summary courts-martial. The Navy's position was subsequently rejected by some federal courts.\textsuperscript{56} In light of Levy how will the issue be resolved? In short, will the uniqueness of the military community be sufficient ground for a court to conclude that a serviceman's constitutional right to counsel is not the same as it is for his civilian counterpart?\textsuperscript{57}


\textsuperscript{54} 407 U.S. 25 (1972).

\textsuperscript{55} See Betonie v. Sizemore, 369 F. Supp. 340 (M.D. Fla. 1973) modified, 496 F.2d 1001 (5th Cir. 1974); Everett, supra note 13, at 676-77.


\textsuperscript{57} The Supreme Court will have the opportunity to answer these questions in Middendorf v. Henry, 493 F.2d 1231 (9th Cir. 1974), cert. granted, 43 U.S.L.W. 5241, 3300 (1974).
67 MILITARY LAW REVIEW

And what of other constitutional protections? Since various articles of the Uniform Code authorize the death penalty,68 what effect does Furman v. Georgia69 have on military trials and the right of a court-martial to impose a death sentence?60 Another question still to be answered is whether a military accused’s counsel has a right to discover whatever files are in the government’s hands, regardless of any security classification or restriction upon use impressed on those files.61

As I have indicated, Levy may serve to emancipate military justice from some of the possible constitutional restraints to which many considered it subject. The extent of this emancipation may hinge on such imponderables as the occurrence of vacancies on the Supreme Court and the manner in which President Ford fills any such vacancies, i.e., whether he chooses men who are conservative with respect to criminal law administration. However, no immediate retreat from some of the broad pronouncements of Levy seems likely.

If significant change in military justice is not to be required by the Supreme Court, Congress might still initiate changes. Frankly, however, this seems unlikely. Senator Ervin has been the congressional leader in seeking improvements of military justice. Early in 1962 and again in 1966 his Subcommittee on Constitutional Rights conducted important hearings on the rights of military personnel.62 The efforts of Senator Ervin and his subcommittee were largely responsible for the Military Justice Act of 1968,63 somewhat a “trade-off”

69 408 U.S. 218 (1972).
70 The Supreme Court expressly reserved this question in deciding Schick v. Reed, 43 U.S.L.W. 4083 (U.S. Dec. 23, 1974). Only Article 106 of the Uniform Code, 10 U.S.C. § 906 (1970), which punishes “Spies,” provides for a mandatory death sentence; and so, if Furman applies to courts-martial, it would virtually rule out capital punishment in military justice.
71 Apparently this question has been presented to the Court in McChesney v. DeChamplain, appeal filed, 43 U.S.L.W. 3046 (U.S. April 4, 1974) (No. 1346), prob juris noted, argued 43 U.S.L.W. 3346 (1974). [After this speech was given and edited for publication, the United States Supreme Court decided McChesney v. DeChamplain, 43 U.S.L.W. 4453 (U.S., April 15, 1975). (Ed. note)]
between reforms which the Department of Defense desired to enhance efficiency in military criminal law administration and those reforms which Ervin and his colleagues insisted on to protect the rights of servicemen.

For the last two years, however, Senator Ervin has been occupied with the work of an entirely different congressional committee. Upon his retirement, no one is on the horizon who will be able to assume Senator Ervin’s position of leadership in matters relative to military justice. One of the reasons for this situation is the fortuitous circumstance that Senator Ervin was not only Chairman of the Senate Subcommittee on Constitutional Rights of the Judiciary Committee but also a senior member of the Armed Services Committee.64

Furthermore, it is doubtful that, at this point in time, the Department of Defense has any military justice related legislative objectives important enough to justify another compromise resulting in further safeguards for military accused. Thus, some of the conditions which led to the enactment of the Military Justice Act of 1968 are lacking today.

Even so, a few relatively minor legislative or administrative changes in military justice may be in the offing. Several such changes were recently recommended by the Standing Committee on Military Law of the American Bar Association and in turn were approved by the American Bar Association’s House of Delegates.65 Former Judge Advocate General of the Army Kenneth J. Hodson took to the floor in opposition to the changes but was unable to obtain significant support for his objections to recommendations which the House of Delegates apparently viewed as rather technical.

One such change concerns the further expansion of the role of the military judge. The ABA Standing Committee on Military Law has recommended that the military judge be granted sentencing authority, except in capital cases and in those cases where the accused has requested before trial that he be sentenced by the court-martial members. General Hodson felt that in this context, granting sentencing authority to the court-martial members—the military jury—conflicted with ABA Standards of Judicial Administration that call for sentencing to be performed by the judge. Contrariwise, the standing committee felt that in light of the history of military justice and the various elections that have been provided to an accused, including

---

64 The 1966 Hearings were joint hearings. See note 62 supra.
the election to choose an enlisted court, it would be undesirable to deprive a military accused of the opportunity to be sentenced by a military jury. Even today, however, a high percentage of sentencing is done by military judges because the waiver of trial by court members is currently authorized, and frequently exercised.

In broadening the sentencing authority of the military judge, one can only hope that provision would be made for the suspension of sentence and the deferment of confinement by the military judge. Moreover, in line with any increased sentencing power of military judges, the Manual for Courts-Martial should—and probably will—be changed to provide for presentence investigations and reports similar to those in civilian courts.

Because of the increasing professionalism and prestige of the trial judiciary of the various armed services, the power of the convening authority to overrule the military judge on some matters—such as denial of speedy trial—should probably be reexamined by Congress. As a more uniform standard of performance develops among the military judges in the various armed services, I would hope that greater interservice use of the judges will develop. Of course, a military accused may not be content to be tried by a military judge from another service. This is especially true if the accused believes that the trial will be less fair or if convicted, a harsher sentence will be imposed than if he were tried by a military judge from his own service. The grounds for such concern on the part of an accused or his defense counsel, however, will diminish in the years ahead. In that event, whether from congressional sources or otherwise, suggestions will probably be forthcoming that interservice use of military judges should be authorized when it will lead to a speedier or more economical trial. Similarly, there may be encouragement for interservice use of other trial personnel.

At one point in time, Senator Ervin's Subcommittee on Constitu-

---

69 Paragraph 4g(1) of the Manual fully authorizes interservice assignment of military judges.
70 Of course, paragraph 4g of the Manual does contemplate that court-martial members—military jurors—should ordinarily be appointed from the accused's armed force.
tional Rights considered the desirability of authorizing civilians to serve as military trial judges, just as they may serve now on Courts of Military Review.\textsuperscript{71} There was some precedent for the use of civilians in British military criminal law administration. No action was taken and as the law stands today, a civilian may not serve as the military trial judge in a court-martial proceeding. Congress should, I think, grant the military authority to use civilians in this capacity, although I doubt that such authority would ever be used.\textsuperscript{72} On the other hand, The Judge Advocates General probably prefer that Congress remain silent and not grant such authority; if the use of civilians were authorized, it might lead to the widespread use of civilians as military judges.\textsuperscript{73} At present the trial judiciary is functioning efficiently and it is doubtful that the authority to utilize civilians as military judges will be granted by the Congress.

Another recommendation of the ABA Standing Committee on Military Law would preclude the convening authority from reviewing a court-martial conviction with respect to the correctness of determinations of law and fact and automatically reviewing the appropriateness of sentence but would permit him to exercise clemency. On this recommendation there is some possibility of congressional action, since the increasing complexity of military justice suggests that some of the convening authority’s present responsibilities in appellate review might better be performed by legally trained personnel. Indeed, under present statutory provisions, most convening authorities probably depend very heavily on their staff judge advocates with respect to actions on findings and sentence.

There have been proposals that random selection of court-martial members be employed, and I understand that the Army has experimented with this procedure in a project at one post. A proposed panel is selected at random from all military personnel on a post and submitted to the convening authority for approval or disapproval. The Navy, on the other hand, apparently believes that random selection of courts-martial members conflicts with the statutory requirement that the convening authority personally select the court members based on their maturity, experience, and similar criteria of

\textsuperscript{71} Appellate military judges may be either commissioned officers or civilians. \textit{Uniform Code of Military Justice} art. 66(a), 10 U.S.C. § 866(a) (1970).

\textsuperscript{72} Professor Bishop has suggested that some military judges and military defense counsel might be civilians. J. Bishop, Jr., supra note 3, at 300-1.

\textsuperscript{73} I understand that in the Navy, where civilians were once used extensively on the Article 66 Boards of Review, that such use was gradually phased out.
suitability to serve as court-martial members. After the emphasis in Levy on the uniqueness of the military community and in view of some of the administrative problems that might be encountered in using random selection at small commands, it is seriously doubted that Congress will ever choose to require selection of court members in this manner. On the other hand, random selection of court members, even under current provisions of the Uniform Code, is permissible. The convening authority’s decision to appoint court members in this manner is a permissible exercise of his personal discretion. If, however, the technique is invalidated by the Court of Military Appeals, legislation specifically authorizing the use of random selection will probably be enacted.

A recurring complaint against the military justice system concerns the independence of military defense counsel, and legislation to assure more fully the separation of defense counsel from command influence has been proposed. Recommendations of the recent Task Force on the Administration of Military Justice in the Armed Forces led to a requirement, imposed by then Secretary of Defense Laird, that each armed service develop plans for assuring such separation. The Army and the Air Force have chosen to separate defense counsel organizationally—and frequently geographically—from other military justice activities. The Navy JAG, I understand, has used this requirement as justification for pulling most of its military justice activities out of the regular chain of command, but the defense counsel are not organizationally separated from other legal activities. While there may be differences as to the relative efficacy of these two approaches, and although I am not sure that any of these plans have yet been formally approved by the Department of Defense, the mere fact that action has been taken will be sufficient to mute demands

---


76 The Air Force initially established a pilot project in which defense counsel operated independently of the office of the base staff judge advocate. Later the system was extended on a worldwide basis. The Army system is somewhat similar.

77 The Navy has used its eighteen Navy Legal Services Offices as a means of separating defense counsel from command control. Under this system these Offices are under the command of The Judge Advocate General of the Navy, who wears another hat as the Chief of Legal Services. However, unlike the Air Force and Army approaches there is no effort to separate the defense counsel organizationally from lawyers performing other court-martial roles.
for further reform in this area. And those who wish to make no further changes can utilize to their advantage Justice Rehnquist's opinion in *Parker v. Levy*.

Closely related to military justice is the military administrative discharge—a subject I dealt with extensively in an article several years ago.\textsuperscript{77} Senator Ervin has long pressed for new legislation to assure procedural safeguards in administrative discharge proceedings and, two or three years ago there was widespread expectation that some of his proposals would become law. This did not take place. At some future time Congress may require that a military judge preside over administrative discharge hearings, just as he presently presides over special and general courts-martial. This requirement might not only be enacted to provide further procedural safeguards in military administrative discharge proceedings but also to provide additional caseload for military judges.\textsuperscript{78}

Similarly, it is possible that Congress may act to eliminate the general discharge. The general discharge, issued under honorable conditions and entitling the recipient to full veterans benefits, is something of an anomaly, since the stigma it may in fact create is inconsistent with the concept of discharge under honorable conditions.\textsuperscript{79} I am not aware of any specific legislative authorization for the general discharge and believe that it could be eliminated administratively. However, in the absence of such administrative action, Congress may choose to eliminate the general discharge as a means of administrative separation from the service.

If the Supreme Court finally rules that *Argersinger v. Hamlin*\textsuperscript{80} requires that counsel be furnished the accused in summary courts-martial if confinement is to be part of any adjudged sentence, the demise of the summary court-martial might be hastened.\textsuperscript{81} In any event, the Air Force has already virtually eliminated use of the summary court-martial. The Navy remains as the principal defender of such a tribunal. In time, Congress may conclude that the summary court-martial is not essential to the operation of a system of military justice and should be eliminated.

There are some other areas in which Congress might enact enabling


\textsuperscript{78} One must admit that some military lawyers have questioned the possibility that military judges would have any time available for performance of such duties.

\textsuperscript{79} See Everett, *supra* note 77, at 43-4, 59-60.

\textsuperscript{80} 407 U.S. 25 (1972).

\textsuperscript{81} As indicated, *Levy* makes such an outcome less certain.
legislation concerning military justice matters. For example, specific legislative authorization for the use of military magistrates in any decision to release an accused from pretrial confinement and in granting authority for searches, seizures, and similar investigative action might be enacted by Congress.\textsuperscript{82} Additionally, amendments to the Federal Rules of Criminal Procedure may provide models for legislative action or perhaps executive changes in the Manual for Courts-Martial.\textsuperscript{83} For instance, the government might be granted the right to discover certain evidence in the possession of an accused as a condition for its use at trial and to be notified of alibi defenses, among others.

To return, however, to my basic theme, Levy promises to reduce or almost eliminate federal civilian court pressure for change in the administration of military criminal law. Similarly, major congressional action concerning military justice seems unlikely. Frankly, I doubt that the decisions of the Court of Military Appeals will, at this point in its history, require major changes in military justice.\textsuperscript{84}

If change in military justice is to come, it will probably be in response to two internal pressures. One pressure is the requirements of an all-volunteer army. Theoretically, an enlistee by his enlistment contract may waive many of the rights he would possess as a civilian, but the fact remains that, except under the most desperate economic conditions,\textsuperscript{85} persons will not enlist in the armed forces if they feel they will be unjustly treated by the administration of military justice.

A second internal pressure for the continuing reform and improvement of military justice results from the increased professionalization of the military lawyer. In a real sense, The Judge Advocate General's School helps contribute to this pressure. The judge advocates trained at the School are familiar with developments in judicial ad-

\textsuperscript{82} The Army experimented successfully with a military magistrate program—first in Europe and later at Forts Bragg, Dix, and Hood (and has extended it Army-wide in commands with active confinement facilities).

\textsuperscript{83} Similarly, the recently enacted Federal Rules of Evidence, Pub. L. No. 93-595, 93d Cong., H.R. 5463, January 2, 1975, may lead to changes in the evidentiary provisions of the Manual for Courts-Martial. (Since this speech was given several changes to the Manual have been prescribed by Executive Order No. 11835, 40 Fed. Reg. 4247 (1975)).

\textsuperscript{84} Obviously the future actions of the Court will hinge on some new judicial appointments. However, I do not currently anticipate any revolutionary pronouncements by the Court of Military Appeals.

\textsuperscript{85} Of course, this very type of economic condition may be rapidly approaching and is perhaps responsible for the success of the Armed Services in recruiting new members of an all-volunteer military establishment.
ministration, and they are not, I am sure, content to follow precedent merely for the sake of following precedent. Thus, innovations in military justice will be implemented by administrative action from within the system. Incidentally, it is well known that the concepts of the trial judiciary and the military judge began with an Army project in the early 1960's. And there are many other examples of innovation by military lawyers.

Soon after his appointment to the Court of Military Appeals, Judge Paul Brosman wrote that the Court of Military Appeals was freer than most; it was not shackled by the venerable precedents that bind many other appellate courts. Now, in June 1974, the Supreme Court has made clear that military criminal law administration is free from many of the constitutional restrictions that bind civilian courts in their administration of criminal law. How wisely that freedom is exercised will be determined largely by judge advocates, many trained here at The Judge Advocate General's School. Having observed the tradition of the School and its alumni from the days of its first commandant, Colonel Ham Young, to the present, I feel sure that military lawyers will meet this challenge with distinction.

