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To decide in favor of the public anonymity of plaintiff over the legitimate concern of the public in his activity would place too heavy a burden on the public. Properly distinguishing between public concern and mere matters of public interest or newsworthiness the *New York Times* doctrine was properly extended by the *United* court. *United* should not be allowed to be diluted by the public forum standard used by the *Rosenbloom* and *Bon Air* courts.

## The Military Justice Act of 1968: Congress Takes Half-Steps Against Unlawful Command Influence

"[I]f anyone now believes that a court-martial is merely an agency of the commander, and governed solely by his whims, then he is too blind to see what has clearly been spelled out by members of Congress."<sup>1</sup> This remark was aimed at the critics<sup>2</sup> of the Uniform Code of Military Justice<sup>3</sup> (hereinafter the Code) who contended that unfair and unlawful influence of military commanders was controlling the outcome of courts-martial. Judge Latimer was convinced that Congress had done all that could be done to eliminate this evil from the military legal system. Congress was not convinced,<sup>4</sup> however, and has taken some additional steps in the form of the Military Justice Act of 1968<sup>5</sup> (hereinafter the Act).

These steps toward eliminating unlawful command influence<sup>6</sup> are included in the first

1. Commencement Address by Judge George W. Latimer at the Army JAG School in Charlottesville, Virginia, January 18, 1952, at 3; quoted in Landman, *One Year of the Uniform Code of Military Justice: A Report of Progress*, 4 STAN. L. REV. 491, 508 (1952).

2. See, e.g., Farmer & Wels, *Command Control—Or Military Justice*, 24 N.Y.U.L.Q. REV. 263 (1949); Keeffe & Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 151 (1949); Keeffe, *Drumhead Justice: A Look at Our Military Courts*, READER'S DIGEST, Aug. 1951, at 39; Comment, 2 STAN. L. REV. 547 (1950).

3. Uniform Code of Military Justice [hereinafter cited as UCMJ], May 5, 1950, ch. 169, 64 Stat. 107-49. The UCMJ is presently codified in 10 U.S.C. §§ 801-940 (1964).

4. See, e.g., *Summary-Rep. of Hearings on S. Res. 58, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 51 (1963) [hereinafter cited as *1963 Hearings*].

5. Act of Oct. 24, 1968, Pub. L. No. 90-632, 82 Stat. 1335 (effective Aug. 1, 1969).

6. "Command influence" and "command control" are used interchangeably in most discussions of military justice. Those in the military establishment who opt for retaining control in the commander usually distinguish command control or influence—acceptable in their opinion—from *unlawful* command influence—that which is specifically prohibited by UCMJ art. 37, 10 U.S.C. § 837 (1964). Unless indicated otherwise, "command control" and "command influence" will refer to any undesirable influence exercised by a commanding officer.

A definition of other terms used herein is necessary at this point. "Court members" or "members" refers to the three men on special courts-martial or five men on general courts-martial who are the military equivalent of a jury in civilian trials. Not included among "court members" is the "law officer," who under the new amendments will be

major changes of the Code since its enactment.<sup>7</sup> Besides making changes concerning command influence, the Act also revises court-martial procedure, making it more efficient<sup>8</sup> and conforming it to the Federal Rules of Criminal Procedure.<sup>9</sup> It also codifies for all the services<sup>10</sup> existing practices in the Army and the Air Force<sup>11</sup> of providing legally trained counsel for special courts-martial.

### *Command Influence Before the Code*

Military law under the Code has greatly progressed from the days when it was a mere disciplinary instrument.<sup>12</sup> The first major confrontation over commanders' railroading of accused servicemen was between Brigadier General Samuel T. Ansell<sup>13</sup> and Army Judge Advocate General Enoch H. Crowder.<sup>14</sup> Crowder advocated retention of the control of courts-martial in the commander while Ansell "sought to divorce military justice from command control."<sup>15</sup> Ansell backed the Chamberlin Bill,<sup>16</sup> which died in committee.<sup>17</sup> The Articles of War (the predecessor to the Code) were revised at that time<sup>18</sup> but lacked reforms in the area of command influence.

Following World War II, various veterans' groups and bar associations spoke out against the cases of severe injustice in courts-martial arising during that war.<sup>19</sup> In June

called a "military judge," in an effort to increase his prestige. He performs duties similar to those of a federal district court judge in all general courts-martial and, under the new Act, all special courts-martial which may result in a bad conduct discharge. "Trial counsel" is the equivalent of a civilian prosecutor. "Detail," used as a verb, means "assign."

7. For a brief general analysis of the 1968 Act see O'Malley, *Broader Justice for Military Personnel*, TRIAL, Dec.-Jan. 1968-69, at 45; Sherman, *Revised Military Code: A Qualified Assent*, TRIAL, Dec.-Jan. 1968-69, at 44.

8. Articles 1, 16, 19, 25, 26, 39, 41, 42, 45, 49, 51, 52, 57, 66, 73, of UCMJ, 10 U.S.C. §§ 801, 816, 819, 825, 826, 839, 841, 842, 845, 849, 851, 852, 857, 866, 873 (1964), have been amended to provide for more efficient use of court time, speedier handling and settling of cases, and somewhat fairer review procedures.

9. See Articles 26, 39, 41, 45, 51, 57 of UCMJ, 10 U.S.C. §§ 826, 839, 841, 845, 851, 857 (1964).

10. UCMJ applies to all federal armed services—Army, Air Force, Coast Guard, Navy; UCMJ arts. 1, 2(1), 10 U.S.C. §§ 801, 802(1) (1964). It also applies to members of the Public Health Service, Environmental Science Services Administration, and others while serving with the armed forces. UCMJ arts. 1, 2(8), 10 U.S.C. §§ 801, 802(8) (Supp. III, 1965-67).

11. See 1963 *Hearings*, *supra* note 4, at 42.

12. See generally, W. WINTHROP, *MILITARY LAW AND PRECEDENTS* (2 ed. 1920).

13. For Ansell's ideas on military justice see Ansell, *Military Justice*, 5 CORNELL L.Q. 1 (1919); for a critical discussion of Ansell, see Morgan, *The Existing Court Martial System and the Ansell Army Articles*, 29 YALE L.J. 52 (1919).

14. See generally Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

15. Keeffe & Moskin, *supra* note 2, at 151.

16. S.64, H.R.367, 66th Cong., 1st Sess. (1919).

17. Johnson, *Unlawful Command Influence: A Question of Balance*, 19 JAG J. 87, 88 (1965); Keeffe & Moskin, *supra* note 2, at 151.

18. Act of June 4, 1920, ch. 227, subch. II, 41 Stat. 787-812.

19. Johnson, *supra* note 17, at 88.

1945 Secretary of War Robert P. Patterson appointed a clemency board to review all general court-martial cases in which the accused was still in confinement.<sup>20</sup> Because of the startling results of the work of that board,<sup>21</sup> Secretary Patterson set up the War Department Advisory Committee on Military Justice, whose members were nominated by the American Bar Association.<sup>22</sup> The Navy set up a similar committee, the General Court-Martial Sentence Review Board, which uncovered many instances of command control.<sup>23</sup>

Representative Carl T. Durham took the issue of command influence to Congress<sup>24</sup> and recommended that the Articles of War be changed to prohibit censure, reprimand, or admonition of military personnel with respect to the discharge of military judicial responsibilities. Representative Durham introduced a bill,<sup>25</sup> as did Representative Charles H. Elston,<sup>26</sup> to amend the Articles of War, particularly Article 88, to make undue command influence a punishable offense.<sup>27</sup> The House Armed Services Committee considered these bills adequate to stop undue command influence.<sup>28</sup> The bills were combined in 1948, and the Elston Act was passed by Congress in a rider attached to the Selective Service Act of 1948.<sup>29</sup> The Elston Act thus became the first legislative injunction against command influence in the history of the administration of military justice.<sup>30</sup> The effect of this prohibition was soon weakened, however, by paragraph 87(b) of the Manual for Courts-Martial.<sup>31</sup> This paragraph supplemented Article of War 88 to allow pre-trial lectures<sup>32</sup> that could very easily prejudice a case.

20. See *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 64 (1949) [hereinafter cited as *1949 Senate Hearings*].

21. The board, called the "Roberts Board," reviewed more than 27,500 cases and reduced or remitted sentence in 85 percent of them. *Ibid.*

22. The Advisory Committee, known as the "Vanderbilt Committee," called attention to the need to check command control. 1946 WAR DEP'T REP. OF ADVISORY COMM. ON MILITARY JUSTICE 6. See Johnson, *supra* note 17, at 89.

23. This board was known as the "Keeffe Board." For its findings on command influence see 1945 REP., GENERAL COURT-MARTIAL SENTENCE REV. BOARD 62.

24. The "Durham Report," H.R. REP. No. 2272, 79th Cong., 2d Sess. (1946).

25. H.R. 576, 80th Cong., 1st Sess. (1947).

26. H.R. 2575, 80th Cong., 1st Sess. (1947).

27. See *Hearings on H.R. 2575 Before the House Comm. on Armed Services*, 80th Cong., 1st Sess. 4163-64 (1947).

28. H.R. REP. No. 1034, 80th Cong., 1st Sess. 8 (1947).

29. Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627-44.

30. See Johnson, *supra* note 17, at 90.

31. Under Article of War 38, Act of June 24, 1948, ch. 625, tit. II, § 218, 62 Stat. 632, the President was authorized to make rules of procedure for courts-martial. THE MANUAL FOR COURTS-MARTIAL (1949) was the collection of those rules.

32. The commander or staff judge advocate could lecture to an appointed court before trial and preferably before assignment to a particular case on such things as "the rules of evidence, burden of proof, and presumption of innocence, and may include information as to the state of discipline in the command, as to the prevalence of offenses which have impaired efficiency and discipline, and of command measures which have been taken to prevent offenses. Such instruction may also present the views of the Department of the Army as to what are regarded as appropriate sentences for designated classes of offense." MANUAL FOR COURTS-MARTIAL 87(b) (1949). This type of lecture presented an excellent opportunity for command influence.

*Command Influence and the Code Before the Act*

Veterans' groups and various bar associations were still clamoring for reduction of command control. Particularly, they sought to remove the commander's power to convene a tribunal<sup>33</sup> and appoint its members,<sup>34</sup> and to place that power in an independent judge advocate or legal officer.<sup>35</sup> Harvard Law School Professor Edmund M. Morgan was given the task of drafting a new code of military justice. The result was the present Uniform Code of Military Justice. The "crusaders"<sup>36</sup> continued their outcry that the Code left too much power and control in the hands<sup>37</sup> of the commander. Professor Morgan answered their complaints by pointing out that the military system demands discipline and must be controlled to be effective. He asserted that the Code balanced military discipline and justice,<sup>37</sup> and that the necessary and proper command functions in the Code were: the convening of courts-martial,<sup>38</sup> the reference of charges to courts-martial,<sup>39</sup> the appointment of court members,<sup>40</sup> and the initial review of the findings and sentence adjudged by the court-martial.<sup>41</sup> As a means of restricting the commander to his legitimate functions, the drafting committee proposed<sup>42</sup> that an impartial judiciary be established for general courts-martial,<sup>43</sup> that an accused be represented by a lawyer before general courts-martial,<sup>44</sup> that commanders be required to consult with the staff judge advocate or law specialist both before and after a general court-martial,<sup>45</sup> and that military superiors be prohibited under Article 37 from censuring, reprimanding or admonishing members of a court-martial.<sup>46</sup>

The "crusaders" correctly argued that the Article 37 prohibition would be ineffective.<sup>47</sup> The United States Court of Military Appeals, a civilian court of review created by Article 67 of the Code,<sup>48</sup> has reversed numerous court-martial convictions because of prejudicial command influence.<sup>49</sup>

33. Articles of War 8, 9, 10, Act of June 4, 1920, ch. 227, subch. II, § 2, 41 Stat. 788; Act of June 24, 1948, ch. 625, tit. II, § 207, 62 Stat. 629; Act of June 4, 1920, ch. 227, subch. II, § 2, 41 Stat. 789.

34. Article of War 4, Act of June 24, 1948, ch. 625, tit. II, § 203, 62 Stat. 628.

35. See H.R. REP. No. 491, 81st Cong., 1st Sess. 8 (1949).

36. See, e.g., Ward, *UCMJ—Does It Work?*, 6 VAND. L. REV. 186, 224 (1953).

37. *1949 Senate Hearings*, supra note 20, at 37.

38. UCMJ arts. 22-24, 10 U.S.C. §§ 822-24 (1964).

39. UCMJ arts. 30-35, 10 U.S.C. §§ 830-35 (1964).

40. UCMJ arts. 25, 29, 10 U.S.C. §§ 825, 829 (1964).

41. UCMJ arts. 60-65, 10 U.S.C. §§ 860-65 (1964).

42. *1949 Senate Hearings*, supra note 20, at 38.

43. UCMJ art. 26, 10 U.S.C. § 826 (1964).

44. UCMJ art. 27(b), 10 U.S.C. § 827(b) (1964).

45. UCMJ arts. 34, 61, 10 U.S.C. §§ 834, 861 (1964).

46. UCMJ art. 37, 10 U.S.C. § 837 (1964).

47. See *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 644 (1949); Keeffe, supra note 2, at 43.

48. UCMJ art. 67, 10 U.S.C. § 867 (1964). The United States Court of Military Appeals, with three civilian judges, is the civilian watchdog over military justice. It cannot prevent command influence but only some of the resulting unfairness. It is restricted to questions of law only. UCMJ art. 67(d), 10 U.S.C. § 867(d) (1964). The court does not review every case automatically. UCMJ art. 67(b), 10 U.S.C. § 867(b) (1964). In fact, very few court-martial cases reach the Court of Military Appeals. See,

The court set out the procedure for determining the issue of command control upon appeal in *United States v. DuBay*.<sup>50</sup> The court was forced to do so because the past method of "settling the issue on the basis of *ex parte* affidavits, amidst a barrage of claims and counterclaims,"<sup>51</sup> had proven unsatisfactory, particularly in this case, where 14 general courts-martial were being appealed on grounds of the command influence of one commander. Ultimately the sentences of 93 servicemen were reduced<sup>52</sup> or their cases remanded for a new trial.

The appellants contended that the commanding general of Fort Leonard Wood, Missouri had prejudiced their trials. Before trial, each accused agreed to plead guilty in return for the promise of a specified sentence, rather than take the chance of receiving a stiff sentence from the court-martial.<sup>53</sup> In the agreement between the accused and the commander (or a member of his staff), it was understood that if the court-martial rendered a milder sentence the accused could accept it; if the court-martial rendered a harsher sentence, then the commander, exercising his discretion to do so as the convening authority,<sup>54</sup> would reduce it to that agreed upon.

The commanding general, however, took steps to guarantee that the punishment meted out by the court-martial would be much harsher than that agreed upon. These steps included: (1) commending officers who handed down the stern sentences; (2) ordering the staff judge advocate to lecture his officers—who would serve as trial and defense counsel as well as court members—on the sentences given at other posts; (3) personally telephoning the senior member of at least one court to inform that member of his policies; (4) threatening to censure defense counsel who challenged senior officers;<sup>55</sup> (5) excluding lieutenants from the courts in favor of senior officers because he felt lieutenants were handicapped by inexperience; (6) assigning the duty of selecting

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*e.g.*, 1967 ANNUAL REP. OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEP'T OF TRANSPORTATION 4 [hereinafter cited as 1967 ANNUAL REP.], where it is noted that between July 1, 1966 and June 30, 1967, there were 84,764 court-martial cases in the four services, while only 794 cases were docketed with the Court of Military Appeals during that same period.

49. *See, e.g.*, *United States v. Cole*, 17 U.S.C.M.A. 296, 38 C.M.R. 94 (1967); *United States v. Wright*, 17 U.S.C.M.A. 110, 37 C.M.R. 374 (1967); *United States v. Littrice*, 3 U.S.C.M.A. 487, 13 C.M.R.43 (1953). *But see* *United States v. Danzine*, 12 U.S.C.M.A. 350, 30 C.M.R. 350(1961); *United States v. Davis*, 12 U.S.C.M.A. 576, 31 C.M.R. 162 (1961).

50. 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), *mandate amended*, 17 U.S.C.M.A. 678 (1968).

51. *Id.* at 149, 37 C.M.R. at 413.

52. N.Y. Times, June 25, 1968, at 3, col. 5. This news article concerned the test case and its effect on 93 separate Board of Review cases. *See, e.g.*, *United States v. Martin*, C.M. No. 415967 (May 31, 1968).

53. Plea negotiations is an accepted practice in the military if they are initiated by the defense. It is unclear from the records available who was the initiator in these cases. Quite often the staff judge advocate *suggests* to the defense that it should initiate such negotiations, which was probably the case here.

54. UCMJ art. 64, 10 U.S.C. § 864 (1964).

55. For a discussion of challenges, see notes 94, 97 and 98 *infra* and the accompanying text.

court members to a man on his own staff, as opposed to the usual practice of leaving it up to the legal officer. The commanding officer said he had done these things to gain more bargaining power in these plea negotiations and to improve the administration of military discipline. In his first year at the post, 17 percent of the accused in general courts-martial received the maximum sentence; during his second year, after his procedural changes, 35 percent received the maximum. The staff judge advocate had advised the commander against these practices, but the major general "felt free to violate Army regulations if necessary because he was the commanding general and was responsible for military discipline."<sup>56</sup>

It is interesting to note that during these hearings this major general attempted to intimidate the major who was defense counsel. In an encounter in the corridor immediately before a session, the major general, gesturing with his index finger, said, "I want you to know, young man, that many of your questions yesterday [defense counsel had been cross-examining this major general] did not conform to ethics set forth in the manual."<sup>57</sup> The major general advised the defense counsel that he did not want to bring it up in court and that was why he was speaking to him privately.

Those hearings resulted in a finding of no command influence—the major general had only taken an active role in the procedures in his endeavor to maintain discipline and morale. A year later that finding was reversed<sup>58</sup> by a board of review because there was enough evidence to establish the presumption of command influence which the prosecution had failed to rebut.<sup>59</sup>

These cases evidence the fact that Article 37 has not been effective. It is ineffective because it is enforced only upon appellate review, and then it only reverses a specific case.<sup>60</sup> A commander who exercises this unfair influence would certainly be aware of Article 37<sup>61</sup> but would also be aware that the likelihood of any one case reaching the scrutiny of the Court of Military Appeals is slight.<sup>62</sup> What further contributes to the in-

56. Testimony of the staff judge advocate quoted in N.Y. Times, Oct. 19, 1967, at 29, col. 1. All of these facts were brought out in the hearings ordered by the *DuBay* court, as reported in a series of articles in N.Y. Times, July 1, 1967, at 1, col. 5; July 22, 1967, at 1, col. 4; Aug. 16, 1967, at 37, col. 1; Oct. 12, 1967, at 24, col. 1; Oct. 13, 1967, at 11, col. 1; Oct. 19, 1967, at 29, col. 1; Oct. 27, 1967, at 1, col. 5; June 25, 1968, at 3, col. 5.

57. Testimony of the defense counsel quoted in N.Y. Times, Oct. 13, 1967, at 11, col. 1.

58. N.Y. Times, *supra* note 52.

59. Adverse publicity played an important part in these cases. See p. 435 *infra*.

60. Chief Judge Quinn noted the limited effect of the Court of Military Appeals' decisions very early in its history: "Although America prides itself on its government by laws, not men, the laws are of little avail if they are not properly applied at the point of realistic contact with those governed. In the military system, if officers in positions of responsibility, courts-martial and military reviewing authorities do not adhere to the spirit of the Code, then the opinions of this Court are likely to remain monuments only to the good intentions of the judges writing them." Quinn, *The Court's Responsibility*, 6 VAND. L. REV. 161, 162 (1953).

61. UCMJ art. 37, 10 U.S.C. § 837 (1964) is one of the articles which must be explained carefully to each enlisted man upon his enlistment, upon the completion of six months active duty, and again upon each subsequent reenlistment, pursuant to UCMJ art. 137, 10 U.S.C. § 937 (1964).

62. See discussion *supra* note 48.

effectiveness of Article 37 is the fact that there have been no convictions for its violation<sup>63</sup> under punitive Article 98.<sup>64</sup> Perhaps this is so because of the difficulty in proving the specific intent required by Article 98,<sup>65</sup> or because no officer wants to bring charges against another officer for something he would have done himself. Or perhaps the need for *good* officers and *good* soldiers is such that the military will tolerate these infractions.

An excellent example of what might happen to those in the service who charge command influence is the recent story of Lieutenant Thomas McGuire.<sup>66</sup> He charged that there was command influence in courts-martial at Fort Meade, Maryland and, as a result, was given a poor quarterly evaluation. An Army review board quashed the report. His record now has a suspicious "unrated" period, and his reputation in the service is that of a troublemaker. Sources in the U.S. Army point out that Lieutenant McGuire got the treatment he did from the Army review board because the Washington Post was watching the case closely, giving it full publicity. What happens to those men who have the temerity to raise the issue but lack the good fortune to receive publicity?

Two members of a board of review which had reviewed several of the Fort Leonard Wood cases<sup>67</sup> had suggested that an investigation of the commanding general's actions in those cases should be made by the Judge Advocate General of the Army. Two days later they were notified by telephone that they were being transferred to other duty, *i.e.*, Vietnam.

The major general was not prosecuted but was transferred to an innocuous post in Washington. This is severe punishment for a career officer whose profession has been commanding large numbers of men. But it is not so severe in comparison to the damage done by his controlled courts-martial. Certainly a case of command influence not sensational enough to receive news coverage will not result in prosecution or punishment.

In 1962 Congress again investigated military justice to be certain that servicemen's constitutional rights were intact. One of the areas investigated was command influence.<sup>68</sup> During the hearings Professor A. Kenneth Pye pointed out the injustices inher-

63. See Comment, *The Court-Martial as a Sentencing Agency: Milestone or Millstone*, 41 *MILITARY L. REV.* 81, 88 (1968).

64. 10 U.S.C. § 898 (1964). Since Article 37 is not a punitive article, *i.e.*, it does not provide for punishing violators, prosecution would have to be initiated under Article 98, which does provide for punishment "as a court-martial may direct" for failure to comply with procedural rules such as Article 37.

65. Article 98 provides in part: "Any person subject to this chapter who . . . (2) *knowingly and intentionally* fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct." (Emphasis added.)

66. See Washington Post, Feb. 9, 1969, § D, at 1, col. 7.

67. See pp. 433-34 *supra*.

68. 1963 *Hearings*, *supra* note 4, at 15-22.



ent in the military due to command influence.<sup>69</sup> He also noted subtleties of command influence that might never be remedied, such as the use of "satisfactory" on a man's efficiency report, which is not a reprimand in theory but might well be one in practice. A mere "satisfactory" on the record of a career officer may be as much a hindrance as a bad report. The hearings also revealed the practice of putting the best advocates on the prosecution side and the weakest on the defense.<sup>70</sup> Denials of any undue command influence were made by the services.<sup>71</sup> Out of these hearings arose 16 bills, many overlapping,<sup>72</sup> all failing to alter military justice.

In 1966 hearings were again held,<sup>73</sup> resulting in Senator Ervin's omnibus bill, the Military Justice Bill of 1967.<sup>74</sup> It failed to pass. Finally, in October 1968, The Military Justice Act of 1968 was passed.<sup>75</sup>

69. *Id.* at 18:

[E]ven before a general court-martial there still exist factors, perhaps inherent in the nature of the system, which cause the reasonable observer to wonder if ever we can approach perfect justice to the same extent in the military as we do in civilian life. The members of the court are still chosen by the general who is their commander. The efficiency report of the defense counsel is still prepared by the staff judge advocate who had recommended that there was probable cause for believing that the defendant was guilty. The defense counsel is still under the command of the officer who referred the case to trial. The members of the court-martial are usually officers and during the course of their training have become aware of the fact that a case should not be referred to trial unless it has been investigated and unless competent authority has determined that there is probable cause . . . that the defendant is guilty. Yet these officers must presume that he is innocent. The staff judge advocate who prior to trial has recommended that the case be tried, has the responsibility after trial to review impartially the case to determine, among other things, if the evidence is sufficient to sustain the conviction.

I do not suggest that most commanders or staff judge advocates attempt to interfere with the faithful performance of their duties by court members and counsel. I do think, however, that the fear of causing displeasure to superiors is considered by many court members and counsel. The defense counsel who has the option of asserting a defense which will embarrass his commander or staff judge advocate appreciates that this officer may ruin him professionally simply by marking his efficiency report "satisfactory" without utilizing any letter of reprimand, transfer, or punitive measure. Perhaps this fear does not affect the courageous officer. I think, however, that there are officers who, looking forward to promotion or retirement, are not oblivious to the practical realities of military life.

70. *Id.* at 19.

71. *Ibid.*

72. See Comment, *The Proposed Military Justice Act of 1967: First Class Legislation for "Second Class" Citizens*, 72 DICK. L. REV. 92 (1967).

73. *Joint Hearings on Bills to Improve the Administration of Justice in the Armed Forces Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess. (1966).

74. S. 2009, 90th Cong., 1st Sess. (1967). For a discussion of this bill see Comment, *supra* note 72, and Ervin, *Military Justice Act: Time For Revision*, TRIAL, Feb.-Mar. 1968, at 16.

75. Act of Oct. 24, 1968, Pub. L. No. 90-632, 82 Stat. 1335 (effective Aug. 1, 1969).

*Command Influence and the Act*

The Military Justice Act of 1968 was meant to be "non-controversial."<sup>76</sup> It is "non-controversial" because it is ineffective, at least in the area of command influence. Article 37 is amended to specifically exempt general informational courses on military justice from that Article's prohibition.<sup>77</sup> The wording of this amendment is consistent with the standards set by the Court of Military Appeals;<sup>78</sup> yet it was the intention of the Senate Armed Services Committee that this provision reverse a Court of Military Appeals decision.<sup>79</sup> Although it does not specifically reverse any one case, it does make certain that the most frequently used method of influencing courts—pre-trial lectures and courses—is not a violation of the Code.<sup>80</sup>

Article 37 is further amended to prohibit evaluating a serviceman in his fitness reports according to his performance in a court-martial.<sup>81</sup> This is pure formalism, and nothing more than a warning to commanders that such ratings are an undesirable practice. Consider the difficult burden of proof, hinging on establishing the commander's state of mind at the time he rated the particular man. Consider who would bring charges against the commander.<sup>82</sup> Certainly, neither a fellow commander nor the serviceman who received the poor rating is likely to bring charges. If the serviceman should

76. H.R. REP. No. 1481, 90th Cong., 2d Sess. 2-4 (1968); S. REP. No. 1601, 90th Cong., 2d Sess. 3 (1968).

77. "The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial . . ." Act of Oct. 24, 1968, Pub. L. No. 90-632, § 13(C), 82 Stat. 1338.

78. See *United States v. Wright*, 17 U.S.C.M.A. 110, 37 C.M.R. 374 (1967).

79. S. REP. No. 1601, 90th Cong., 2d Sess. 9 (1968).

80. Pursuant to UCMJ art. 36, 10 U.S.C. § 836 (1964), the President may prescribe rules for courts-martial. He exercised this power in the *MANUAL FOR COURTS-MARTIAL* of 1951, paragraph 38 of which is quite similar to the 1949 Manual discussed in note 32 *supra* and the accompanying text, with the result that command influence seems to be cultivated rather than eliminated.

A standard procedure of many commanders of large bases is to set up a standing court for a set length of time to hear a number of cases. This practice leads to the danger of command influence because it is much easier to indoctrinate one court with exempted courses than it is when a new court is convened for each case. Coupling this more effective indoctrination with the commander's reaction to the decision of each case, it is not difficult to conclude that such a court will be prejudicially influenced by the commander.

81. Act of Oct. 24, 1968, Pub. L. No. 90-632, § 13(D), 82 Stat. 1338:

In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

82. UCMJ art. 30, 10 U.S.C. § 830 (1964).

bring charges against the commander, he may be subjected to continued harassment from that commanding officer or the accused's fellow commanding officers if the accuser should happen to be transferred. He risks transfer to a hazardous or undesirable duty post, continued poor ratings, or possibly an administrative discharge as an "undesirable troublemaker."<sup>83</sup> For these reasons there will be no more prosecutions under the amended Article 37 than were had under the old Article 37.

The Act also makes several less obvious attempts to eliminate undue command influence. Article 26<sup>84</sup> of the Code has been amended to provide, in new subsection (c), for an independent field judiciary, an independent group of professionals who are responsible only to the Judge Advocate General for directions and fitness reports.<sup>85</sup> Under the existing Article,<sup>86</sup> the law officer, whose title is changed to "military judge" under the Act, is appointed to the court by his commanding officer, the convening authority. The commanding officer is able to influence those in his command because he outranks them—the major premise of military life is obedience to superiors. He also has the power to effect unwanted transfers, retard promotions, and file general fitness reports. As one Code critic, Professor Arthur John Keeffe, put it: "Lawyers or not, the officers will continue to try to avoid the 'old man's' displeasure."<sup>87</sup> The Act theoretically negates the possibility of command influence being exerted on the military judge by removing him from the command of the convening authority; but, realistically, as long as someone outranks the military judge, the possibility of command influence continues to exist.

The Act takes a step in the right direction by amending Article 26(b).<sup>88</sup> The new provision, Article 26(e),<sup>89</sup> is consistent with the Court of Military Appeals condemnation of closed sessions in which the military judge aids the court-martial members in putting their findings in order.<sup>90</sup> These private conferences present the possibility that the military judge might influence the decision of the court; the situation is similar to that of a civilian judge instructing the jury in his chambers in the defense counsel's absence.

83. Because of the nature and circumstances of such actions there are no records available. Such actions are difficult to document and only come to light when by chance or otherwise they receive some publicity. See, *e.g.*, note 66 *supra* and accompanying text.

84. 10 U.S.C. § 826 (1964).

85. Act of October 24, 1968, Pub. L. No. 90-632, § 9, 82 Stat. 1336-37.

86. UCMJ art. 26(a), 10 U.S.C. § 826(a) (1964).

87. Keeffe, *Drumhead Justice: A Look at Our Military Courts*, READER'S DIGEST, Aug. 1951, at 39, 43.

88. 10 U.S.C. § 826(b) (1964) provides: "The law officer may not consult with the members of the court, *other than on the form of the findings* as provided in section 839 of this title (article 39), except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court." (Emphasis added.) UCMJ art. 39, 10 U.S.C. § 839 (1964) does not provide for presence of the accused or his counsel at these consultations on the form of the findings.

89. Act of Oct. 24, 1968, Pub. L. No. 90-632, § 9, 82 Stat. 1337: "The military judge of a court-martial *may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel*, nor may he vote with the members of the court." (Emphasis added.)

90. *United States v. Manuel*, 16 U.S.C.M.A. 357, 36 C.M.R. 513 (1966).

The Act amends Article 66<sup>91</sup> to prohibit a member of the court of military review (formerly board of review) from participating in any way in the preparation or submission of a fitness report or any other document used in determining another member's qualifications for advancement in grade, assignment or transfer, or retention on active duty. It also prohibits a member from reviewing any case in which he was an investigating officer, member of the court-martial, military judge, trial or defense counsel, or reviewing officer.<sup>92</sup> Even though the amendments to Articles 26 and 66 are only half-steps towards eliminating command influence, they are an advancement.

The Military Justice Act of 1968 does not eliminate the problem of command influence. It may remove some instances of it, but as long as military men are tried by military men the problem will continue to exist. As long as the commander has the power to appoint the members of the court<sup>93</sup> (the military equivalent of a jury), the problem will continue to exist. Defense counsel has only one peremptory challenge,<sup>94</sup> and the effectiveness of that challenge is nullified by the practice of commanders overstocking the court with *reliable* members. The Code sets no maximum number on the members,<sup>95</sup> and an unwritten practice has been to assign more members to a court-martial than the minimum required by the Code.<sup>96</sup> It is not uncommon to see, for example, nine members assigned to a special court-martial. Since only one could be peremptorily challenged,<sup>97</sup> the challenge of two more for cause<sup>98</sup> would still leave six members who have been thoroughly indoctrinated, if not expressly instructed, by the commander.

As long as the trial and defense counsel are detailed by their commanding officer, the convening authority,<sup>99</sup> the problem of command influence will continue to exist. Although under the Act both trial and defense counsel will normally be lawyers,<sup>100</sup> professional men hopefully above undue influences, the practice of assigning the best lawyers to the prosecution and the less proficient to the defense will continue. If the case reaches the Court of Military Appeals, the errors made by unskilled counsel may be corrected. The court can review only questions of law,<sup>101</sup> however, and thus the crucial evidentiary damage may never be corrected.

### *Conclusion*

The solution to the problem of command influence is uncertain. One solution may be to set up a civilian court system for all trials of servicemen. But this system would com-

91. 10 U.S.C. § 866 (1964).

92. Act of Oct. 24, 1968, Pub. L. No. 90-632, § 27(E), 82 Stat. 1342.

93. UCMJ arts. 25, 29, 10 U.S.C. §§ 825, 829 (1964).

94. UCMJ art. 41(b), 10 U.S.C. § 841(b) (1964).

95. UCMJ art. 16, 10 U.S.C. § 816 (1964).

96. *E.g.*, UCMJ art. 16(2), 10 U.S.C. § 816(2) (1964) provides for a minimum of three members for special courts-martial.

97. UCMJ art. 41(b), 10 U.S.C. § 841(b) (1964).

98. UCMJ art. 41(a), 10 U.S.C. § 841(a) (1964).

99. UCMJ art. 27, 10 U.S.C. § 827 (1964).

100. UCMJ art. 27(b), (c), 10 U.S.C. § 827(b), (c) (1964) *as amended by* Act of Oct. 24, 1968, Pub. L. No. 90-632, § 10(B), 82 Stat. 1337.

101. UCMJ art. 67(d), 10 U.S.C. § 867(d) (1964).

pletely ignore any military exigencies, thereby hindering the efficiency of the military and forcing the military to resort more frequently to administrative discharges. But legislation on administrative discharges may be forthcoming.<sup>102</sup> Another solution may be to mete out "non-judicial" punishment<sup>103</sup> for lesser offenses, while reserving the major offenses for this civilian court system. The Department of Defense would probably vigorously oppose enactment of either of these solutions.

A third solution may be to create a full time civilian advisory board that would have access to all courts-martial records and all prisons.<sup>104</sup> This board could review any and all cases and report to the Department of Defense and to the Congress on a regular basis. The Code already provides for a similar annual report by the Court of Military Appeals and the Judge Advocates General.<sup>105</sup> This advisory board would have more freedom, however, for it would not be restricted to only those cases appealed.

It has been suggested that to lessen the possibility of command control over defense counsel,<sup>106</sup> a separate defense corps should be set up.<sup>107</sup> This suggestion has been rebutted with the argument that "it is undesirable to build up a group of men in the Army whose sole work is defending accused persons. In that way you build up a philosophy, an attitude, in these men which is not healthy, . . . you should not have a group of men in the service whose sole duty is opposing the Government."<sup>108</sup>

To reduce the influence of commanders on sentencing, it has been suggested that the sentencing power be given to the military judge, whom the Act makes part of an independent corps.<sup>109</sup> If this is done the members of the court who now set the sentence<sup>110</sup> could be freed from pressure to satisfy the commander.

Command influence may be intentional or unintentional, but it does exist as part and parcel of the military system.<sup>111</sup> This influence is today much different from the

102. Senator Ervin will reintroduce legislation similar to his omnibus bill of 1967; see Ervin, *Military Justice Act: Time for Revision*, TRIAL, Feb.-Mar. 1968, at 16.

103. UCMJ art. 15, 10 U.S.C.A. § 815 (Supp. 1969).

104. See Keeffe, *JAG Justice in Korea*, 6 CATHOLIC U.L. REV. 1, 37 (1956).

105. UCMJ art. 67(g), 10 U.S.C. § 867(g) (1964).

106. Judge Latimer noted some of the pressures that bear on military defense counsel in *United States v. McMahan*, 6 U.S.C.M.A. 709, 717, 21 C.M.R. 31, 39 (1956).

107. See 1963 *Hearings*, *supra* note 4, at 19-20; Keeffe, *supra* note 104, at 18; Keeffe & Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 151, 165 (1949).

108. Mr. Donald Rapson, a witness representing the Association of the Bar of the City of New York, 1963 *Hearings*, *supra* note 4, at 19.

109. Comment, *supra* note 63, at 91-92.

110. UCMJ arts. 51, 52, 10 U.S.C. §§ 851, 852 (1964).

111. Comment, *supra* note 63, at 88-89:

Despite his most conscientious efforts to be objective and to prevent his personal feelings from affecting the outcome of courts-martial, a strong commander casts an aura of influence on the courts-martial system, primarily in the area of sentence. Frequently this influence exists only subconsciously in the minds of the court-martial members, *i.e.*, a subconscious effort to satisfy what they feel "the old man" would want done in a particular case. On other occasions influence may be exerted, unwittingly perhaps, through a general comment to a court-martial president or member at a social occasion. In still other cases influence may be directly and intentionally exerted by direct action of the convening authority or his subordinates, with specific intent to correct disciplinary matters in the command, both real and imagined. [Citing

obvious cases during World War II, when an angry admiral could order the court to "[t]hrow the book" at a young sailor.<sup>112</sup> But it is a very real threat to the fairness of a serviceman's trial.

Mr. Justice Black has indicated that it is futile to attempt to parallel the military system with the civilian system: "conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."<sup>113</sup> Nonetheless, military justice can be improved further to eliminate all the obvious occasions of undue influence that still threaten to subvert the court-martial into an "agency of the commander . . . governed solely by his whims."<sup>114</sup>

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*United States v. Knudson*, 4 U.S.C.M.A. 587, 16 C.M.R. 161 (1954).] The fault in many of these instances lies not in the commander or in ineffective codal controls, but in a system where officers responsible to the commander in every other respect are asked to ignore completely his desires in performing this one military function.

112. Keffe, *supra* note 87, at 39.

113. *Toth v. Quarles*, 350 U.S. 11, 17 (1955).

114. Commencement Address by Judge George W. Latimer at the Army JAG School in Charlottesville, Virginia, January 18, 1952, at 3; quoted in Landman, *One Year of the Uniform Code of Military Justice: A Report of Progress*, 4 *STAN. L. REV.* 491, 508 (1952).