

T H E A D V O C A T E

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THE ADVOCATE is intended to foster an aggressive, progressive and imaginative approach toward the defense of military accused in courts-martial by military counsel. It is designed to provide its audience with supplementary but timely and factual information concerning recent developments in the law, policies, regulations and actions which will assist the military defense counsel better to perform the mission assigned to him by the Uniform Code of Military Justice. Although THE ADVOCATE gives collateral support to the Command Information Program [Para. 1-21d, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General.

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CONTENTS

Judge Ferguson: Guardian of Individual Rights	1
Clemency and Parole Practices	10
Sentence Reduction after Action by Convening Authority	17
Defending a Haircut Case	22
Recent Cases of Interest to Defense Counsel	25
Parting Remarks	28

JUDGE FERGUSON: Guardian of Individual Rights

[Ed. Note. THE ADVOCATE wishes to thank Captain John T. Willis, JAGC, Commissioner, U.S. Army Court of Military Review (Panel 4), for contributing this article.]

On November 29, 1971 the Honorable Homer Ferguson retired from active service on the United States Court of Military Appeals.^{1/} Although he remains a senior judge, available to sit with his consent at the call of the Chief Judge of the Court,^{2/} an era in military justice has ended.

When he took the oath of office on April 9, 1956^{3/} Judge Ferguson joined a young tribunal still searching for its identity. The United States Court of Military Appeals was less than five years old and still struggling with growing pains as the first civilian tribunal empowered with direct review of courts-martial. While the early Court had given notice of its independence before Judge Ferguson's elevation to the bench, its break with traditional military justice was yet incomplete. Homer Ferguson brought an unmatched wealth of experience to the Court for this task. After sixteen years of private law practice, fourteen years as a circuit court judge in Michigan, twelve years as a United States Senator from that state, and over a year serving as this country's ambassador to the Phillipines, his experience and insight was destined to enrich military justice. Indeed, the appearance of Judge Ferguson on the bench of the Court of Military Appeals sounded the death knell for "drumhead justice."

For over fifteen years his service on the Court of Military Appeals was characterized by a deep concern for the statutory, constitutional, and human rights of the military accused. He demanded strict observance of the substantive and procedural rules designed to protect these rights by those charged with the administration of military justice. Convening authorities who either became personally involved in the court-martial process or transgressed congressional mandates against improper command influence

^{1/} Judge Ferguson was succeeded by Robert M. Duncan, B.S., Ohio State University, 1948; LL.B., Ohio State University, 1952; 1952-56, U.S. Army; 1969-71; Justice of the Supreme Court of Ohio.

^{2/} Article 67(a)(4), Uniform Code of Military Justice.

^{3/} Judge Ferguson replaced Paul W. Brosman who died of a heart attack in his chambers on December 21, 1955.

were certain to be rebuffed by Judge Ferguson. See Petty v. Moriarty, 20 USCMA 438, 43 CMR 278 (1971) (enjoining rereferral to a GCM from a SPCM because accused requested presence of witnesses); United States v. Greene, 20 USCMA 232, 43 CMR 72 (1970) (court composed of high ranking officers alone appears improperly selected); United States v. Crawford, 15 USCMA 31, 35 CMR 3 (1964) (dissenting to court composed only of high ranking NCO's and officers); United States v. White, 10 USCMA 63, 27 CMR 37 (1958) (convening authority disqualified to take action on record after granting immunity to prosecution witness). Dissenting in cases that approved certain types of pretrial "orientation lectures " the Judge observed:

"One can hardly imagine a police chief or prosecutor being allowed to deliver a lecture to a jury in civilian life immediately before trial. . . . Nothing has ever persuaded me that the rigors of military discipline require a different procedure. Fundamental fairness is the same in either milieu, and it ill behooves any officer sworn to uphold the laws to engage in what is nothing less than common jury fixing." United States v. Wright, 17 USCMA 110, 114, 37 CMR 374, 378 (1967).

Staff judge advocates who impinged upon an accused's statutory rights, particularly through an "erroneous, inadequate, or misleading" advice or review, felt the sharp quill of COMA's hoary judge. United States v. Boatner, 20 USCMA 376, 43 CMR 216 (1971). Particularly disturbed by one staff judge advocate's pretrial conduct which he felt made a mockery of the concept of an impartial advice and review, Judge Ferguson declared:

"I am not at all unsympathetic to military problems, but solution to them is not found in disregard of Congressional mandates. Indeed, if half the effort now employed in evading Codal restrictions was directed toward its honest acceptance and use, the

problems themselves would probably disappear." United States v. Dodge, 13 USCMA 525, 531, 33 CMR 57, 63 (1963).

The dramatis personae of the court-martial itself also bore the close scrutiny of Judge Ferguson in his effort to insure an impartial determination of the findings and sentence. He authored reversals where the law officer had assisted in the preparation of the charges (United States v. Renton, 8 USCMA 697, 25 CMR 201 (1958)), had met with court members outside the presence of the accused and counsel (United States v. Turner, 9 USCMA 124, 25 CMR 386 (1958)), or had engaged in an unrecorded conference with the staff judge advocate to suggest an amendment to a specification and charge, an action "beyond the mere perusal of the file in order to prepare for trial." United States v. Priest, 19 USCMA 446, 448, 42 CMR 48, 50 (1970). When a military judge reversed his previous ruling on the materiality of witnesses, Judge Ferguson found that "his capitulation to the will of the convening authority was an abuse of discretion." United States v. Sears, 20 USCMA 380, 43 CMR 220 (1971). Outraged by the abandonment of the impartial role required of a judicial officer he once exclaimed: "Instead of occupying the desk reserved for the law officer, he should have properly been seated behind the trial counsel's table." United States v. Mortensen, 8 USCMA 233, 238, 24 CMR 43, 48 (1957). Prosecution-minded court members likewise occasioned reversals with Judge Ferguson writing for the majority. United States v. Dotson, 21 USCMA 79, 44 CMR 133 (1971). His opinions on instructions, admissibility of evidence, and argument of counsel also demonstrated his insistence that court members be truly impartial triers of fact. An early decision perhaps most symbolic of this effort and, in fact, probably a turning point in the development of military justice was the prohibition against the use of the Manual by court members. United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957). Anticipating the reaction to this judicial rule making he declared:

"We are fully aware that the change in the system of military law occasioned by this decision represents a substantial departure from prior service practices. However, we cannot but feel that such change was imperatively needed if the system of military law is to assume and maintain the high and respected place that it deserves in the jurisprudence of our free society." Id., at 408 and 218.

One of Judge Ferguson's greatest concerns during his tenure on the "Military Supreme Court" was the adequate representation of the military defendant and the related protection of the attorney-client relationship. His unswerving devotion to these concepts was expressed early in his career on the court in an opinion limiting practice before general courts-martial to qualified attorneys:

"Without regard to the situation which existed prior to the Code, we believe that the day in which the non-lawyer may practice law before a general court-court-martial must draw to an end. . . . The stakes involved in a general court-martial are too high and the price paid for incompetence and lack of professional ability is too dear to permit an accused's life and liberty to rest in the hands of one untrained in the law." United States v. Kraskouskas, 9 USCMA 607, 609-10, 26 CMR 387, 389-90 (1958).

If military counsel abandoned or represented their clients inadequately, Judge Ferguson was not adverse to using the few but potent powers of appellate review to remedy the wrong. See, e.g., United States v. Rose, 12 USCMA 400, 30 CMR 400 (1971) (reversed where defense counsel failed to present strong available evidence in mitigation); United States v. Faylor, 9 USCMA 547, 26 CMR 327 (1958) (reversed where defense counsel representing co-accused neglected one to the benefit of the other). However, Judge Ferguson

recognized the sometimes difficult position in which a young, relatively inexperienced military lawyer found himself in attempting to defend his client. Vigorously dissenting to the recent tacit approval of trial counsel being the immediate superior of defense counsel he wondered:

"How can there be any due process or public confidence in military justice when we are confronted with supposed opponents and advocates, one of whom depends on the other for the success of his career, his promotions, his assignments, indeed, whether he will in fact even be able to remain an officer? The keystone of legal ethics is the avoidance of conflicts of interests. Our Canons repeatedly recognize the truth of the Scriptural injunction that no man can serve two masters. . . . Is it not enough that defense counsel are subjected to the pressures inherent in having their performance rated by the staff judge advocate, who has already recommended trial in the case and thus occupies a somewhat hostile position?" United States v. Hubbard, 20 USCMA 482, 485, 43 CMR 322, 325 (1971).

The senior judge has been the foremost guardian of an accused's right to counsel, expressing dismay when those charged with the administration of military justice manifest "a rather callous disregard for the nature of the attorney-client relationship." United States v. Gaines, 20 USCMA 557, 562, 43 CMR 397, 402 (1971). In United States v. Murray, 20 USCMA 61, 42 CMR 253 (1970), he rejected the notion that the attorney-client relationship could be severed for the mere administrative convenience of the government--there a routine change of station. It was with apparent disappointment that Judge Ferguson, during the last term of court, once more found himself in dissent on a counsel issue, observing:

"It is enough to note that, in my almost fifteen years on the bench of this Court, I have observed a sufficient number of instances of what can only be described as unconcern, on the part of those responsible, for the establishment and protection of this relationship, to justify the conclusion that there exists, albeit, subconsciously, a distinct lack of

appreciation for the personal involvement of an attorney with his client.

. . .

"The relationship between an attorney and client is personal and privileged. It involves confidence, trust, and cooperation. There is more to creating the relationship of attorney and client than the mere publication of an order of appointment." United States v. Johnson, 20 USCMA 359, 362-63, 43 CMR 199, 202-3 (1971).

Finally, any tribute to Judge Ferguson should not fail to recognize and praise his impact on the constitutional philosophy of the Court of Military Appeals. Prior to Judge Ferguson's appointment to the Court, it had been held that military defendants received the benefit of constitutional guarantees only as they had been incorporated into the Uniform Code of Military Justice by Congress.^{4/} Although Judge Ferguson first implicitly agreed with this theory of sifted constitutional rights,^{5/} a simple four sentence concurring opinion marked a change:

"It is my considered opinion it cannot be contended that a man who joins our armed forces and offers his person to fight for the Constitution and the institutions predicated thereon forfeits the fundamental guarantees granted to citizens generally, except those excluded by the Constitution expressly or by necessary implication, which this document affords the accused." United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958).

^{4/} See United States v. Sutton, 3 USCMA 220, 11 CMR 220 (1953); United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951) (then Chief Judge Quinn dissented from the majority position).
^{5/} United States v. Parrish, 7 USCMA 337, 22 CMR 127 (1956).

Judge Ferguson's decisions, as well as his words, enhanced this position. In applying Miranda to the military he sharply replied to the counter-assertions of the Navy Judge Advocate General: "The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, ipso facto deprived of all protections of the Bill of Rights." United States v. Tempia, 16 USCMA 629, 631, 37 CMR 249, 251 (1967). In United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960), Judge Ferguson, although proclaiming that Article 49 was only being given in effect, "a correct and constitutional construction," declared a part of the Uniform Code of Military Justice unconstitutional by forbidding the use of written interrogatories at trial when the defense objects. His constitutional philosophy and that of Judge Quinn, has become the position accepted by most practitioners and commentators on military law. The loss occasioned by the departure of Judge Ferguson from active service is offset by the hope that his efforts have indelibly engrafted the U. S. Constitution onto the body of military law.^{6/}

In the last period of Judge Ferguson's tenure on the Court of Military Appeals, while a new majority refined and reevaluated prior case law and acted more cautiously, Judge Ferguson refused to rest content with past improvement in the sustance and administration of military justice. The dilution of speedy trial rights, the narrowing of Article 31, the emasculation of O'Callahan, and the application of a more stringent harmless error rule forced Judge Ferguson into more frequent dissent. In his last full term of court he comprised the minority in approximately 28% of the decisions, registering more dissent than the other judges combined. Fortunately, Judge Ferguson's legacy to military justice is not limited to the character of his participation in recent years but rests instead in the rich and full body of case law he produced in over fifteen years of service on the Court. The former one man grand jury who exposed government corruption in Detroit and the former legislator exposed to the experier

^{6/}It is presently impossible to know which constitutional position will emerge as the Court of Military Appeals works out a new majority on this issue. Judge Duncan appears to be in the pivotal position, with the options of embracing the Jacoby-Tempia philosophy or of joining with Chief Judge Darden in refusing to apply constitutional protections "ex proprio vigore." United States v. Prater, 20 USCMA 339, 342, 43 CMR 179 (1971).

of World War II and the Korean War became a major architect of military due process injecting much substance into that concept. Sensitive to the congressional intent in passing the Uniform Code of Military Justice and cognizant of human frailty as well as dignity from his thirty years at the civilian bar and bench, Judge Ferguson endeavored to instill a sense of fundamental fairness into the administration of military justice. His willingness to attempt the balancing of individuals rights and the imponderable "military necessity" is comfort to concerned military practitioners and scholars. His activism, often called liberalism, naturally provoked considerable criticism and comment. Behind some of the criticism is an unguarded inference that his decisions coddled criminals or created needless expenditures of time and effort. To the first, the absence of evidence that decisions like Jacoby, Tempia, Davis, Murray, impair the administration of military justice, and the relatively constant conviction rates in the military, need only be noted. For the critics of his interpretation of prejudicial error he provided a partial explanation in one of his last opinions decrying the virtual abandonment and repudiation of Care:

"The importance of these procedural steps cannot be over-emphasized, particularly in military law, when an accused is faced with charges before a court-martial, far from home and friends, is represented by a military counsel, tried by his superiors, and is usually faced with a tempting offer for a greatly reduced sentence in return for not contesting the case against him. Such 'bargain justice' itself demands the most meticulous inquiry into the providence of the pleas to ascertain that the accused had not merely bartered away his rights out of unwarranted fear of the consequences." United States v. Burton, 21 USCMA ____, 44 CMR ____ (1971).

Similar arguments for adopting a strict standard in the military were put forward in his dissent in United States v. Luebs, 20 USCMA 475, 478, 43 CMR 315, 318 (1971). Additionally, faced time and time again with blatant disregard of Codal provisions and noting the relative ineffectiveness of Article 37 and the absolute nonuse of Article 98, the Senior Judge has declared, "Reversal, therefore, remains the only shield to which an accused may look for protection against arbitrary interference." United States v. Wood, 13 USCMA 217, 231, 32 CMR 217, 231 (1963). See also dissents in United States v. Harris, 21 USCMA _____, 44 CMR _____ (1971); United States v. Ray, 20 USCMA 331, 43 CMR 171 (1971).

The future of military criminal law like the future of civilian criminal law is clouded and probably destined for a period of consolidation and calm. Judge Ferguson's departure from active service may mean to military justice what the departure of the person who administered him the oath of office, former Chief Justice Earl Warren, signified for civilian criminal justice. In anxiously anticipating the future and working for solutions to current problems we can only trust that Judge Ferguson's dedication, diligence, and respect for the rule of law will be a model for present and future judges in the military justice system. We in the Defense Appellate Division may feel Judge Ferguson's absence most directly in our daily work, but it is the individual member of the Armed Forces facing possible criminal action who owes the deepest gratitude and has benefited most from his service on the Court.

For the immense contribution to the development of military justice and for unswerving dedication to his office, we in the Defense Appellate Division give an unqualified salute and hearty thanks to Homer Ferguson, Senior Judge, United States Court of Military Appeals. His career on the Court will forever mark him as a giant.

CLEMENCY AND PAROLE PRACTICES

I

The division of function between military trial defense counsel and appellate defense counsel can create the situation where the accused falls through the gap in the middle. There are many functions which the trial defense counsel can perform which may substantially benefit his client in the period after conviction but before the appellate defense counsel takes responsibility for the case. Cf. Paragraph 48k, Manual for Courts-Martial, United States, 1969 (Revised edition); Paragraph 78, DA PAM 27-10, August 1969, The Trial Counsel and The Defense Counsel. This article will attempt to deal with the area of sentence remission and the trial defense counsel's role after the court-martial in helping the client to obtain a reduction in sentence. In subsequent articles, we hope to discuss other areas, such as the legal merits of the case, restoration to duty, and civil and collateral disabilities incurred by reason of his conviction.

Often it is difficult to convince local commanders to exercise sentence clemency on behalf of a client. Under Article 74, UCMJ, the trial defense counsel can take the case to the Secretary of the Army, who has the power to remit or suspend any portion of the unexecuted part of any sentence (Art. 74a) (except those approved by the President) or to substitute for good cause, an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial (Art. 74b). The major regulations applying these powers are AR 190-36, 1 January 1972 (Mitigation, Remission, and Suspension of Sentences) (replacing AR 633-10) and AR 15-130, 2 July 1968 (Army and Air Force Clemency and Parole Board). See also Paragraph 105, Manual for Courts-Martial, United States, 1969 (Revised edition).

II

If the client is in a local stockade, on excess leave, or on regular duty pending completion of his unexecuted sentence, any commanding officer of the client "who has the authority to appoint a court of the kind that imposed the sentence, or any superior military authority, may mitigate, remit, or suspend, in whole or in part, any

unexecuted portion of a sentence (including all uncollected forfeitures) adjudged by a court-martial, other than a sentence to death or dismissal or affecting a general officer." Paragraph 2a, AR 190-36. The Secretary of the Army has, therefore, delegated back to the local commander the authority to remit sentences, so long as the soldier is not in confinement at the United States Disciplinary Barracks. This means that even after the convening authority's action, the defense counsel can petition for clemency based on whatever factors he deems appropriate for a reconsideration of the sentence.^{7/} Cf. Para. 48k(1), MCM, 1969 (Rev.). While limitations of time and ingenuity may preclude a vigorous exercise of this option, in appropriate cases as when good extenuation and mitigation evidence is discovered after the convening authority's action, trial defense counsel should petition in writing for sentence remission, making sure that all correspondence and responses are forwarded for inclusion in the record of trial on appellate review.

As mentioned, however, remedies may be sought beyond the soldier's present command, sometimes with more likelihood of successfully gaining clemency. The first is The Judge Advocate General, who, at any time prior to the completion of appellate review, may remit any unexecuted portion of a sentence other than a sentence extending to death or dismissal or affecting a general officer. Paragraph 2a, AR 196-36. The second is the Secretary of the Army,

^{7/}There may be situations where the convening authority will not be the commander who can take the mitigating action. When the soldier is in a stockade not under the jurisdiction of the convening authority, the commander exercising general court-martial jurisdiction over the stockade prisoners will be the one to petition. Paragraph 4a, AR 190-36. As a practical matter, however, the two commanders will probably coordinate on the request, unless the client can be transferred to another jurisdiction more favorably disposed to granting clemency.

who may be petitioned directly under the provisions of Article 74(a).^{8/} Both actions should be coordinated with appellate defense counsel.^{9/}

III

If your client is being sent to the Disciplinary Barracks at Fort Leavenworth, Kansas, you can do a great deal by preparing him for the sentence remission opportunities available to him at the DB. The Secretary of the Army has established an elaborate procedure for deciding which prisoners will have their confinement reduced and/or their discharges changed, or who will receive parole.^{10/} By telling the client generally what he may expect, he may be better prepared to seek inclusion in the approximately 25% of all DB prisoners who, at least in 1971, had their sentences reduced by the Secretary of the Army.

^{8/}Note that the Secretary may act only on unexecuted portions of any sentence. Thus, if appellate review has been completed and the sentence executed, other administrative remedies would have to be used. See AR 15-185, 8 January 1962, Army Board for the Correction of Military Records; AR 15-180, 18 January 1968, Army Discharge Review Board (No jurisdiction over GCM discharges or dismissals; only BCD-Special Court-Martial discharges reviewable).

^{9/}Contact can be made with the appellate defense counsel assigned to a case by communication with the Chief, Defense Appellate Division, U.S. Army Judiciary, Nassif Building, Falls Church, Virginia 22041 (Autovon 289-1807).

^{10/}Restoration to duty is a fourth and, most obviously, extremely important type of sentence remission. See Article 75, UCMJ; AR 633-35, 12 June 1967, Restoration of Military Prisoners Sentenced to Confinement and Discharge. From July 1971 to February 1972, approximately 40 prisoners at the DB have been restored to duty. This number represents a small percentage of the number of prisoners who request restoration. In a subsequent article, we hope to cover this area in greater depth.

^{11/}Mention should be made that The Judge Advocate General has an independent remitting authority over DB prisoners prior to completion of appellate review. However, the Commandant, US Disciplinary Barracks, has no authority to change any GCM sentence or a BCD-special discharge, except that he may suspend any uncollected forfeitures. Paragraph 2b(3)(a) and (b), AR 190-36.

After the prisoner is in the DB for four months (if his sentence is two years or less) or seven months (if his sentence is over two years), his case is automatically reviewed for clemency or parole action. Prior to going before the DB Clemency Board, the prisoner will already have had interviews or consideration by the DB disposition officer, parole officer, restoration officer (if restoration to duty is desired), and psychiatrist. The reports of supervisors and counselors will help determine the recommendations made, for the prisoner's adjustment to confinement is closely observed, as are his ability to stay out of trouble and his initiative in pursuing the vocational and educational opportunities provided at the DB. Attitude is most important, and the authorities apparently endeavor to encourage the best that the prisoner can produce.^{11/} The trial defense counsel can emphasize (particularly to the client who pled not guilty) that the DB prisoner has the opportunity to shorten his confinement time through his own best behavior.

The lawyer can also help his client by anticipating the day when the DB Clemency Board will review the client's case. Although there is presently no right to legal representation before this five-member board, the lawyer can submit written matter for the board's consideration. Further, he might want to encourage his client to write out his reasons for clemency, including any increased awareness he now felt concerning his responsibility for his actions. Helpful, also, may be copies of relevant clemency matters taken from the record of trial, for the DB apparently gets no copy of the prisoner's record of trial. (Make sure the client retains an intact copy of his record of trial). Again, post-trial extenuation and mitigation should be forwarded for consideration by those passing on clemency, the DB Clemency Board being the first such agency.

^{11/}A more complete assessment will hopefully be made through first-hand observation.

The DB Clemency Board's recommendations, together with those it received from others, plus the recommendations of the Commandant of the DB, are forwarded to the Clemency Actions Branch, Office of the Provost Marshal General, HQDA (DAPM-CRA), Washington, D.C. 20314. There, a lieutenant colonel and two civilian analysts review the file, write a summary, and make their own recommendations. Their only source of information concerning the trial is the staff judge advocate review.

One of the two civilian analysts, then personally briefs the Army and Air Force Clemency and Parole Board (C & P Board). The board meets in the Pentagon and consists of three members: a permanent civilian chairman, Mr. Lloyd F. Janssen, and two rotating military members, one each from the Army and Air Force. No individual military member sits more than once or twice a month. The board apparently relies a good deal upon the recommendations made at the DB since personal contact is important in evaluating clemency. C & P board members do not personally interview the prisoners although the prior civilian chairman used to visit the DB to talk with eligible prisoners. There is currently no right to formal legal representation before the board, but communication with the members by mail, telephone or interview is permissible. Trial defense counsel should again coordinate any efforts he wishes to make in this regard with appellate defense counsel. Clearly, however, the door is open to providing as much favorable information as possible.

The C & P board recommendations are forwarded to Mr. Francis X. Plant, Special Assistant to the Under Secretary of the Army. Usually, the recommendations are accepted, and Mr. Plant has been delegated the authority to act for the Secretary of the Army in approving the clemency and parole actions. Here again, personal contact, with high level references, may be of help.

The following represents a synopsis of 1971 clemency and parole proceedings as finally approved by the Secretary of the Army:

Clemency

Number considered	1863
Reductions in confinement	467
Percent reduced	25%

Parole

Number considered	466
Approved	124
Percent approved	26.6%

CHANGES IN TYPES OF DISCHARGE

DD to BCD	152
DD to general discharge	5
BCD to general discharge	17
Total	<u>174</u>

Percent changed 9%

Records are unavailable to indicate how much confinement time was on the average remitted. The cases in which the type of discharge was changed are currently under study and more information will be provided as it is gathered. The following example, however, should be very instructive to all counsel on the importance of the clemency and parole procedures:

	<u>PRIVATE X</u>	
RANK		PFC E-3
AGE		21
MARITAL STATUS		Single
Education		7th
GT		89
CHARACTER OF SERVICE		Good
CREDITABLE SERVICE		3 years, 1 month
PRIOR COURT-MARTIALS		None
ARTICLE 15's		5
CURRENT OFFENSES		134
		1. Possession 16 Dec 70 of 22.8 g. marihuana
		2. Possession 16 Dec 70 of 1 g. heroin

PRETRIAL CONFINEMENT	None
DATE OF TRIAL	14 Apr 71
PLACE OF TRIAL	Long Binh Post, RVN
PLEAS	
SENTENCE (MIL JUDGE)	DD 18 mos, CHL, TF, E-1
ACTION (IN ACCORDANCE WITH PRETRIAL AGREEMENT)	BCD, 8 mos, TF, E-1
ARMY COURT OF MILITARY REVIEW	BCD, 6 mos, TF, E-1
SECRETARY OF THE ARMY EXTENUATION AND mitigation	BCD changed to a general discharge Unsworn statement and three letters (pastor and neighbors)
AWARDS	VSM, NDSM
DB Behavior	Unknown
REMAINING ARMY COMMITMENT AT TIME OF TRIAL	20 months

A strong effort was made to determine what policies determined clemency decisions. Since each decision is based on the facts peculiar to the case, it is difficult to establish any general rules. Indeed, any strict guidelines would destroy the principle that each prisoner is treated individually. Some policies are outlined in AR 15-130, Paragraph 3, particularly in the area of sentence uniformity. However, when the sentence is excessive or the soldier has shown himself worthy, the C & P board will exercise its clemency and parole powers. The major factor appears to be the personalities of the board members. Mr. Janssen indicated that the thrust of the board's discretion should be in favor of mitigating sentences. Empathy and an understanding that most of the offenders are young and immature encourage a lenient attitude. A major factor appears to be whether the offense is an isolated occurrence or a pattern of behavior. Also, if at the DB the offender has really proven that he has changed, the opportunity for clemency is improved. The trial defense counsel is the one lawyer who can talk with the soldier and personally encourage him to do the very best he can at the DB. The rest of his life can depend upon it.

SENTENCE REDUCTION AFTER ACTION BY CONVENING AUTHORITY

Two cases have come to our attention involving trial defense counsel mistakenly advising convicted clients about their appellate rights. The lawyers involved were only marginally at fault, but the issue is clear enough that all military lawyers should avoid the error.

Punitive discharges were adjudged in both of these uncontested cases. One was a general court in which the approved sentence includes a dishonorable discharge and eighteen months confinement; the other sentence, from a special court-martial, involved a bad conduct discharge and forty-five days confinement. In both, the accused felt very discouraged and disinterested in their future and any further involvement with the Army. Counsel's belief that there were no errors in the record of trial and the soldiers' concern in cutting processing time occasioned the advice that if the client waived appellate representation it would take less time to have their discharges finally executed and the case finished. So, without appellate representation the cases were reviewed by the Court of Military Review and affirmed, with a six-month sentence cut on the general court sentence.

As so often happens, the clients later began to realize that their sentences were more of a burden than they at first anticipated. When they were notified that the Court of Military Review affirmed their convictions, they decided that they now wanted to petition for review of their cases in the Court of Military Appeals, and specifically requested appellate representation. Through affidavits of trial defense counsel and of the appellants, it developed that incomplete advice had been given regarding appellate rights and remedies. In one of the cases, the individual had been properly advised that he had an automatic right to appellate review before a three-judge panel of the Army Court of Military Review; that civilian counsel could be hired or military counsel provided free of charge; that even if no counsel were requested, the Court would review his case. In the other case, it was not clear exactly what rights were discussed; but the advisory session was admittedly no more than a few minutes because of counsel's heavy case load. The soldier later explained that he did not know exactly what the papers meant which

he signed. In both cases, however, the crucial error was that counsel did not make clear that in addition to reviewing the cases for legal errors, the Court of Military Review could review the sentence and reduce it. Contrary to most, if not all appellate criminal procedures in the United States, Article 66c, Uniform Code of Military Justice, provides that the Court of Military Review "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Although the Court cannot suspend any portion of the sentence or substitute an administrative discharge for a punitive one, it can remit or set aside part or all of the sentence. This power is considerable and has been exercised, although further study is needed to determine the amount of relief actually given when sentences are modified.^{12/}

In the cases mentioned, motions to remand were filed before the Court of Military Appeals, urging that the appellants had not made a knowing waiver of appellate representation at the Court of Military Review because their trial defense counsel neglected to inform them of that court's power to reduce sentences and of the useful role of appellate counsel, in arguing the appropriateness of a reduction in sentence. United States v. Darring, 9 USCMA 651, 26 CMR 431 (1958). The Court granted the

^{12/} In a typical recent month, (November, 1971) the following statistics were published by the U.S. Army Judiciary:

Actions on cases disposed of by Court of Military Review:

Findings and sentence affirmed	68.3%
Findings affirmed, sentence modified	22.3%
Findings partially disapproved, sentence affirmed	1.1%
Findings partially disapproved and rehearing ordered	0.4%
Findings and sentence affirmed in part, disapproved in part	1.8%
Findings and sentence disapproved, rehearing ordered	1.8%
Findings and sentence disapproved, charges dismissed	2.1%
Returned to field for new SJA review--CA action	1.8%
Motion for appropriate relief, denied	0.4%

motions to remand, including having the case heard before different panels of the Court of Military Review. United States v. Dye, No. 24,846, 9 December 1971; United States v. Counce, No. 24,832, 9 December 1971.

Practices may vary among counsel, but the following suggestions concerning post-trial advice to clients are offered for your consideration. First, particularly in guilty plea cases, try to give the client a period of time in which to absorb the effect of the court-martial and to decide upon his future. Second, advise him of all the alternatives available, integrating his plans for the future with the effects that a punitive discharge will have on his future. Third, outline for him what issues in his case look most promising for appellate reversal or reduction of his sentence. In this regard, try to get as many extenuation and mitigation documents as possible presented to the convening authority for inclusion in the record of trial, even if not admitted at the trial itself. Trial defense counsel has a great deal of latitude in bringing matters into the record for consideration by the convening authority, and therefore by the Court of Military Review. When it appears that no one at your post or office is listening to your arguments, the Courts in Washington might. Use the options available under Article 38c, Uniform Code of Military Justice, and Paragraph 48k, Manual for Courts-Martial, United States, 1969, (Revised edition), to get the facts aired before other listeners. Fourth, get from him the name, address, and telephone number of a person who will always know his whereabouts, and whom he authorizes appellate defense counsel to contact. Have this information included in his request for appellate representation. Fifth, advise him to execute a power of attorney on the model of the one at the end of this article so that appellate defense counsel can petition on his behalf to the Court of Military Appeals or request a new trial. Sixth, prepare the client for what he can expect at the Disciplinary Barracks and what avenues he has, whether in or out of confinement, to obtain clemency on his sentence. If he is going to the DB, the best advice is that his attitude and behavior will markedly determine how long he spends at the DB, whether he will be restored to duty, and whether he ultimately will receive clemency on his discharge. If he is out of confinement, advice should be given on the relative advantages of remaining on duty or requesting

excess leave. Finally, become familiar with the following regulations which can have a profound effect on whether your client has to live with his punitive discharge the rest of his life:

- AR 15-130, Army and Air Force Clemency and Parole Board
- AR 15-180, Army Discharge Review Board
- AR 15-185, Army Board for the Correction of Military Records
- AR 190-36, Mitigation, Remission and Suspension of Sentences
- AR 633-35, Restoration of Military Prisoners Sentenced to Confinement and Discharge

As a final caveat, requests for appellate representation imply that the client wants his counsel to work as hard as he can to get the case reversed or sentence remitted. If the client's desires are less than this, he should clearly write what he wants and send the letter to the Defense Appellate Division, U.S. Army Judiciary. For example, if he does not want to be restored to duty, but wants his confinement reduced, he should so state. In those cases where he appears to have no interest in what happens to him, remind him that in most instances, the men wish that they had tried everything to change their discharges when they later return to civilian life and find themselves unable to obtain a decent job.

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NOMLAC

A monthly newsletter published by Robert Rivkin, Esq. 140 Leavenworth Street, San Francisco, Ca, 94102, called Newsletter on Military Law and Counselling, (NOMLAC) has recently been called to our attention. This newsletter provides valuable information on recent changes in Armed Forces regulations, and recent military, federal and state cases of interest to defense counsel. There is no subscription charge, although donations are welcome.

* * * * *

POWER OF ATTORNEY

I, _____, _____, _____,
(Name) (Rank) (SSAN)

have made, constituted and appointed, and by these presents do make, constitute and appoint the Chief, Defense Appellate Division, US Army Judiciary, Nassif Building, Falls Church, Virginia 22041, and such other appellate defense counsel as may be appointed under the provisions of Article 70, UCMJ or paragraph 102, MCM for the defense of my case, my true and lawful attorney or attorneys for me in my name, place, and stead, and for my use and benefit, and as my act and deed, to execute, file and prosecute a petition for a new trial in the court-martial case of the United States against _____ (accused) under the provisions of Article 73, UCMJ; and to execute, file and prosecute a petition for grant of review and grant of review in the United States Court of Military Appeals, under the provisions of Article 67, UCMJ, in the event my conviction and sentence are affirmed by the US Army Court of Military Review.

GIVING AND GRANTING to my said attorney full power and authority to do and perform every act and thing requisite and necessary to be done in the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, will full power in me of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute may or shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 19__.

(Signature of Accused) (SEAL) (Typed or Printed Name of Accused)

WITNESS:

(Signature of Witness) (Typed or Printed Name of Witness)

(Address of Witness)

ACKNOWLEDGEMENT

I, _____, do hereby certify that I am (a duly commissioned, qualified and authorized notary public in and for the _____ (an officer with the general powers of a notary public under Art. 136, UCMJ and that _____, grantor in the foregoing Power of Attorney, dated _____, and hereto annexed, who is personally well known to me as the person who executed the foregoing Power of Attorney, appeared before me this day (within the territorial limits of my authority) and executed said instrument after the contents thereof had been read and duly explained to him, and acknowledged that the execution of said instrument by him was his free and voluntary act and deed for the use and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand (and affixed my official seal) this _____ day of _____, 19__.

(SEAL) _____
(Notary Public) (Under authority of Art. 136, UCMJ)

My commission expires _____

DEFENDING A HAIRCUT CASE

"WE CARE MORE ABOUT HOW YOU THINK THAN HOW YOU CUT YOUR HAIR" reads a recently issued recruiting poster designed to attract young men to Army service. With the advent of longer hair styles among enlisted men, and the friction such styles often cause at the unit level, it is obvious that (recruiting slogans aside) the Army cares indeed about how soldiers cut their hair. This command concern is often reflected by an increase of hirsute clients facing nonjudicial punishment or court-martial for failing or refusing to be shorn. In representing these clients, defense counsel might consider the following matters.

Offenses involving transgressions against haircut, beard and mustache restrictions are often charged under Articles 90, 91 or 92, Uniform Code of Military Justice, alleging disobedience of various kinds of orders. Counsel should consider challenging haircut orders on the basis that they infringe upon first amendment rights, Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), because such hairstyles are protected expressions of racial pride or religious convictions (e.g. Mennonite) which override military requirements not based upon military necessity. In another vein, judging compliance with haircut orders may depend upon the whim of commanders who must compare actual styles with photographs in the omnipresent "Army Haircut Policy" poster. This human comparison may be attacked on the basis of vagueness, since determination of a violation of the order depends more upon personal opinion than upon a definite standard, especially with regard to the bulk and tapering of hair styles.

The basic haircut policy is contained in AR 600-20, amplified by the poster reflecting six acceptable hair styles. Often a commander will order a soldier to have his hair cut to comply with the provisions of the policy or the regulation. If disobedience of such orders is charged under Articles 90, 91, Uniform Code of Military Justice, consideration should be given to an argument that such orders are only orders to obey the law, and therefore punishable only under the ultimate offence, a violation of Article 92 for

failure to obey AR 600-20. (See United States v. Bratcher, 39 CMR 125 (1969)). Of course, an argument may be made that the regulation is not punitive in nature, but merely intended for general guidance, thus negating a prosecution for its violation.

One avenue of potential success in haircut cases involves the spectre of illegal command influence. By a memorandum dated 3 September 1971, the Chief of Staff, through the Secretary of the General Staff, cautioned the heads of all Army staff agencies that AR 600-20 was not being enforced and that "[t]he resulting improper appearance of Army personnel [was] totally unacceptable." To insure command compliance with stated haircut policies, the memo provided that "firm corrective action will be taken against those who violate the stated haircut policy, as well as those in the chain of supervision and command who fail to detect such violations or enforce prescribed standards." (Emphasis added.) Counsel should investigate local distribution of the memorandum, and should seek out any local policy statements to the same effect. A careful voir dire of court members concerning departmental or local policy statements may reveal the existence of persuasive command influence with respect to the enforcement of appearance regulations. The personal expressions of the Chief of Staff may have reached the unit level, thus creating pressure upon commanders to implement haircut policies on a "strict enforcement" basis. Of course, many commanders find their way onto court-martial panels and should be carefully questioned about the possibility of pressure from above. Counsel should consider moving to dismiss charges brought as the product of command influence, in addition to challenging affected court members.

Another value of a careful voir dire in haircut cases is to establish a basis for a motion for a change of venue. Indeed, where command haircut policies are stringent and preclude a court's ability to consider facts and defenses objectively, counsel should make such a motion. Pretrial publicity may also have influenced court members, especially those who have read Jack Anderson's syndicated column "Washington Merry-go-Round." Last fall, readers in Washington saw headlines proclaiming "Westmoreland Cuts Line on Hair,"

and "Army Brass Can't Abide Long Hair." Washington Post, October 11, 1971 and October 28, 1971. Questions for voir dire should be thorough enough to inquire about the reading habits of court members in this regard, especially in areas where publicity has been given to the Army haircut policy and haircut cases. Close-cropped court members may reveal a keen awareness of the so-called haircut problem, as amplified through the news media. Of course, a motion for change of venue should be framed based upon the amount and effect of publicity in this regard.

In addition to the matters mentioned above, counsel will often have available the defense that his client did get a haircut, as prdered. Success on that theory depends upon the terms of the order given, the credibility of the commander and of course, the relative credibility of your client.

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* SECOND REQUEST *
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* In the September-October *
* 1971 issue of THE ADVOCATE *
* (Vol. 3, No. 7) subscribers *
* were requested to send us *
* a copy of the local regu- *
* lation governing pretrial *
* confinement in their *
* jurisdictions to be used *
* in a survey of confinement *
* policies and practices *
* throughout the U.S. Army. *
* The response, thus far, has *
* been extremely disappoint- *
* ing. We are at a loss to *
* explain this apparent lack *
* of concern by our subscrib- *
* ers to an area of military *
* justice which needs so much *
* definition. We renew our *
* request for copies of these *
* regulations. *
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* * * * *

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

SUBPEONA POWER--VENUE CHANGE--At a pretrial hearing the defense requested that H, an essential witness, be brought from the United States to Germany to testify at trial. The military judge held his ruling in abeyance, but later denied the request because H was in the United States and could not be compelled to come to Germany and testify. Later, the military judge ordered the prosecution to divulge the identity of an informant, who turned out to be H. Defense again requested H be returned, but the judge denied the request, evidently because the defense did not show what the substance of expected testimony would be. Moreover, the defense had been establishing an entrapment theory and it was obvious that it wished H to testify as to this defense.

Court of Military Review held that the government should have requested that H voluntarily return to Germany to testify and if he refused the trial court's venue should have been changed to United States, where H could have been subpoenaed. The Court noted that H was an essential defense witness, and the constitutional rights of the defendant were violated when H did not testify. The Court refused to say that H could have been compelled to return to Germany and testify under subpoena, but does hold that a change of venue must be ordered where an essential defense witness refuses voluntarily to attend trial held overseas. United States v. Snead, No. 424397, 27 January 1972.

GUILTY PLEAS--INCONSISTENT MATTERS--The appellant pleaded guilty to having committed a number of offenses, including an aggravated assault with a razor blade, pursuant to a pretrial agreement. In the providency inquiry, the appellant revealed that he had warned stockade officials of his being in danger because he had antagonized a group of prisoners in a racial incident and had requested protection. Left unprotected, he was covered with a blanket and assaulted by a group of prisoners. To avoid being badly hurt, he cut one prisoner whose leg he could see under the blanket, on his leg. The military judge found this revelation to be inconsistent with the guilty plea, so informed the trial defense counsel, and granted a recess. During the recess, the trial defense counsel provided the military judge in chambers, with off-the-record assurances to the effect that

his client really was guilty. After the recess, the military judge conducted an extensive inquiry into the inconsistent matters and then concluded that the plea was provident. The Court of Military Review held: (1) the self-defense situation revealed in the providency inquiry was inconsistent with guilty plea; (2) the military judge's attempt to resolve inconsistencies by further inquiry was procedurally correct; (3) military judge's conclusion that plea was provident on the basis of the inquiry was unjustified since nothing brought out in the later inquiry or in the pretrial papers indicated that defense of self-defense was not available to the appellant; (4) Court warned that trial defense counsel's in-chamber assurances to military judge as to the validity of the guilty plea could be viewed as unprofessional conduct. United States v. Hazelwood, No. 427291 (24 January 1972).

SEARCH AND SEIZURE--PROBABLE CAUSE--Appellant was apprehended for an off-limits violation and subjected to a "frisk search" by MP's. While transporting appellant to the MP office, one of the MP's noted appellant reach behind rear jeep seat, as if to drop something from vehicle. After releasing appellant to the desk sergeant, the MP's returned to the spot at which appellant had been observed reaching behind the seat and found a cigarette pack containing suspected marihuana in the roadway. Appellant was then subjected to a detailed search at the MP station which revealed heroin.

Court of Military Review held that, assuming the appellant could be apprehended a second time while in custody and searched incident thereto, the second search in the instant case must fall because of a lack of probable cause which to rejected government's theory that the in-custody search was incident to the initial legal apprehension for the off-limits violation. United States v. Carney, S-6347, (27 January 1972).

SEARCH INCIDENT TO APPREHENSION--On a request by appellant's company commander, the appellant was apprehended for barracks larceny of a wallet and its contents. The MP who searched appellant incident to the apprehension testified that the initial pat down led him to believe that appellant had no weapons or evidence on his person. Notwithstanding this, the MP went on to appellant's hair (Afro), cap; pockets, pant legs, and sleeves, which, when rolled down, disclosed a vial of

heroin. The MP stated that the search was an "SOP" search which was not related to the reason for the apprehension, but only the fact of apprehension, and that he would have performed the same kind of search if the appellant had been stopped for a traffic violation. In addition, there was evidence that MP was acting upon mere suspicion that the appellant possessed drugs.

Court of Military Review held, citing Sibron v. New York and Peters v. New York, 392 U.S. 40, 67 (1968), the search incident to apprehension was not reasonably limited in scope. Under the facts, the goal of the search could only have been a weapon, a wallet or its contents. United States v. Brashears, S-7394 (9 February 1972).

MILITARY JUDGE--REQUEST FOR INDIVIDUAL COUNSEL--Appellant request on three occasions that the convening authority make Major F available to defend him. All three requests were denied by the convening authority for the alleged reasons that Major F was preoccupied with other duties and some of those duties precluding him from acting as defense counsel because of conflicting interests. The defense moved to dismiss all charges and specifications because appellant had been denied counsel of his choice. In support of its motion defense called Major F to testify. The military judge interrupted the testimony of Major F, and denied the motion to dismiss without affording the defense an opportunity to present additional evidence. In so doing he stated:

"I am denying this motion to dismiss all charges and specifications because of a denial of individually requested military counsel, to wit: Major F, on basis 1, I have no jurisdiction to review the matter whatsoever, and/or, two, assuming that I do have such jurisdiction, the extent of my review is only to determine whether the denial has been arbitrary or capricious. Assuming again, that I have the authority, I find the denial . . . is not arbitrary or capricious."

The Court of Military Appeals held that the military judge's doubt as to his authority to act upon the motion not well founded. United States v. Gatewood, 35 CMR 405 (1965). The Court found error by the military judge's foreclosure of the defense from presenting evidence to show that the action of the convening authority was arbitrary and capricious as the defense bears the burden of supporting a claim that the convening authority abused his discretion. United States v. Drewery, No. 426634 (9 February 1972).

PARTING REMARKS

Future issues of THE ADVOCATE will bear the signature of my successor, Lieutenant Colonel Arnold I. Melnick. I cannot leave without giving appropriate testimony of the skills, dedication and devotion to the cause of justice exhibited by the members of the Defense Appellate Division in their daily work and through the pages of this publication.

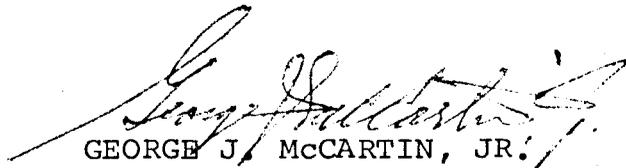
This brainchild of Captain Paul C. Saunders, then of the Defense Appellate Division, began with the initial issue of March 1969, under the aegis of Colonel Daniel T. Ghent, Chief of the Defense Appellate Division. This unofficial newsletter for military defense counsel, in the early stages often called "underground", enjoyed immediate acceptance by defense counsel, and later came to be recognized as a great help to trial counsel, and staff judge advocates, as well. From an initial printing of 300 copies, THE ADVOCATE has gained wide acceptance and recognition as an innovative and challenging bellweather in the military justice field of law. At present, it is carried in many law school libraries, and is frequently requested by civilian attorneys, interested in the military justice scene.

The widespread acceptance and status THE ADVOCATE has achieved in such a short time is attributable, for the greatest part, to the unselfish dedication and devotion of the Defense Captains of this Division, to the role of the defense in the military justice system. Most of their research and writing, for THE ADVOCATE, was accomplished (although frequently generated by their appellate experiences) on their own time, after duty hours, at home, and in the office.

It should be noted for the record that although the Chief, Defense Appellate Division, was responsible for the finished product, the actual ideas, research, writing and editing were done by the members of the division on their own initiative, and voluntarily. No mention of THE ADVOCATE would be complete without recognition of the work of its first editor, Captain Paul C. Saunders, his successor, Captain Brian B. McMenamin, and the present editor, Captain Francis X. Gindhart. While the editors set the pace and frequently the tasks, the many contributions of the other members of the division were what really made it a publication to be enjoyed and reckoned with.

Among these others, to name alphabetically only a few, and without any attempt to list all our contributors, were Captains J. Vincent Aprile, II, Norman L. Blumenfeld, Bernard J. Casey, Richard A. Cooper, Alan K. DuBois, Robert B. Harrison, III, and David D. Knoll. Suffice it to say that the editor's job was not an easy one in selecting and cutting down to readable size the many offerings.

In other words, this was the Defense Appellate Captains' contribution to the cause of military justice, and they deserve all credit for its form, content and acceptance. To them, and all defense counsel, I offer my compliments and appreciation in every sense of the word, for the accomplishment of an outstanding job of furnishing the best possible service to our clients, in accordance with our assignment as defense counsel, and the highest purposes of our profession as lawyers and soldiers. To all of you, an "E" for excellence, and a personal "Well Done" and "Thank You."


GEORGE J. McCARTIN, JR.
Colonel, JAGC
Chief, Defense Appellate Division