

A

OUTLINE OF SUMMARY PROCEEDINGS

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Generally, management of the many is the same as management of the few. It is a matter of organization.

Sun Tzu, 400-320 B.C., The Art of War<sup>2</sup>

1. INTRODUCTION

This outline of the summary trial system is designed to first inform the reader, in general terms, about the Canadian military justice system and then deal specifically with how summary proceedings fit within that system. The general information includes sources of military law<sup>3</sup>, the organization of the Canadian Forces and the jurisdiction, punishments and service tribunals of the military justice system. The review of summary proceedings will set out the types of summary trials, the trial procedure and the post trial review process.

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<sup>2</sup> R.D. Heinl, Jr., Dictionary of Military and Naval Quotations (Annapolis: United States Naval Institute, 1966) at 227.

<sup>3</sup> Canadian military law in its broadest sense consists of much more than law regulating discipline (eg. pensions, crown liability, law of armed conflict etc.) and is governed by a number of statutes (eg. National Defence Act R.S.C. 1985, c. N-5, Canadian Forces Superannuation Act R.S.C. 1985, c. C-17., Geneva Conventions Act R.S.C. 1985, c. G-3 etc.), however, for the purpose of this thesis the term "military law" will be solely in reference to the disciplinary system governing the Canadian Forces.

## 2. LEGAL SOURCES OF THE DISCIPLINARY SYSTEM

Discipline and the Canadian military justice system are governed by a variety of laws, orders and instructions. The disciplinary system of the Canadian Forces is prescribed in the Second Division of the National Defence Act<sup>4</sup>, entitled the "Code of Service Discipline". That Code sets out the disciplinary jurisdiction of the services, service offences, punishments, arrest provisions, the jurisdiction and structure of service tribunals, post-trial appeal and review and release pending appeal.<sup>5</sup>

The regulations enacted under the authority of the National Defence Act,<sup>6</sup> The Queens Regulations and Orders for the Canadian Forces (hereinafter QR&O)<sup>7</sup>, provide further detail on the structure and procedures of the disciplinary system.

The National Defence Act also authorizes the Chief of Defence Staff to issue "orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister".<sup>8</sup> One

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<sup>4</sup> R.S.C. 1985, c. N-5 [hereinafter National Defence Act].

<sup>5</sup> Part IX.1 of the National Defence Act, dealing with release pending appeal, is not included in the definition of the "Code of Service Discipline" (National Defence Act, s. 2), however, this appears to have been a legislative oversight. Since the appeal provisions themselves are included in the Code the release pending appeal provisions are treated as part of the Code of Service Discipline.

<sup>6</sup> National Defence Act, s. 13.

<sup>7</sup> The regulations involving the disciplinary process are found primarily in QR&O, Vol. 11, (Disciplinary).

<sup>8</sup> National Defence Act, s. 18(2).

example of such orders is Canadian Forces Administration Orders (hereinafter CFAO). The Chief of Defence Staff is assisted in the preparation of these orders and instructions by officers and staff at National Defence Headquarters. Orders dealing with disciplinary matters may also be issued on behalf of commanders at different levels in the chain of command.<sup>9</sup> These orders can expand the direction given on the procedures applicable to the trial and post-trial process.

### 3. ORGANIZATION OF THE CANADIAN FORCES

The Canadian Forces consists of units or other elements organized by or under the authority of the Minister.<sup>10</sup> There are three basic components of the organizational structure: units, formations and commands. The unit is the basic organizational group within the Canadian Forces. A "unit" is the personnel and material which comprises "an individual body of the Canadian Forces".<sup>11</sup> A unit may be identified as a ship, battalion, regiment, squadron, etc.. In addition, there are "bases", which are units tasked to provide support services to other units in the Canadian Forces. The next level of organization is the "formation", which is comprised of two or more units grouped under a single commander. Examples of formations are the Special Service

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<sup>9</sup> See QR&O, art. 4.12 (command orders) and 4.21 (standing orders).

<sup>10</sup> National Defence Act, s. 17.

<sup>11</sup> "Unit" is defined in National Defence Act, s. 2.

Force, Air Transport Group and the First Submarine Squadron. Most of the formations, bases and units are then allotted to "commands". Examples of these commands are Maritime Command (the navy), Mobile Command (the army) and Air Command (the air force).<sup>12</sup> Each of the commanders at the unit, formation and command level are involved in the military justice system, with summary proceedings being concentrated primarily at the unit level.

#### 4. CANADIAN MILITARY JUSTICE SYSTEM

##### a. Jurisdiction

The Code of Service Discipline applies to a broad range of personnel, most of whom are serving in uniform. However, civilians do on occasion, such as when they accompany serving members of their families overseas, become subject to Canadian military law. For the most part, however, it is officers and non-commissioned members of the regular force and reserve force (under specified conditions, such as undergoing drill or training) who find themselves being dealt with by service tribunals.<sup>13</sup> Civilians cannot be tried by summary proceedings.

An officer is a person who holds Her Majesty's Commission in the Canadian Forces, a person who holds the rank of officer cadet (usually an officer trainee) and a person who pursuant to law is

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<sup>12</sup> Canadian Forces Publication, A-PD-050-0D1/PG-002, Officer Professional Development Program, Student Study Guide for General Service Knowledge.

<sup>13</sup> For a complete list of persons subject to the Code of Service Discipline see the National Defence Act, ss. 60-65.



attached or seconded as an officer in the Canadian Forces. A non-commissioned member is a person other than an officer who is enrolled in, or who pursuant to law is attached or seconded to the Canadian Forces. A listing of the ranks of members of the Canadian Forces is contained in Appendix I.

Service offences are set out in ss. 73 to 130, and s. 132 of the National Defence Act. Section 130 of the National Defence Act incorporates, as service offences, all offences "punishable under Part X of the Act (offences triable by civil courts), the Criminal Code or any other Act of the Parliament of Canada. Therefore, in addition to the Criminal Code<sup>14</sup>, offences under the Narcotic Control Act<sup>15</sup> among others are included as service offences. Section 132 incorporates, as a service offence, all acts or omissions taking place outside Canada which would, under the law applicable in the place where the act or omission occurred be an offence if committed by a person subject to that law. This makes an offence under the criminal law of the Federal Republic of Germany, if committed by a person subject to the Code of Service Discipline, a service offence under Canadian military law. A list of service offences is contained in Appendix II.

The Code of Service discipline provides for a broad territorial jurisdiction. Subject to one exception, a person alleged to have committed a service offence may be charged, dealt

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<sup>14</sup> Criminal Code, R.S.C. 1985, c. C-46 [hereinafter Criminal Code].

<sup>15</sup> Narcotic Control Act, R.S.C. 1985, c. N-1 [hereinafter Narcotic Control Act].

with and tried, regardless of whether the offence was committed in or outside of Canada.<sup>16</sup> The only restriction on this broad jurisdiction is that a service tribunal shall not try any person charged with having committed murder, manslaughter, certain sexual offences and child abduction offences in Canada.<sup>17</sup> In recent years service tribunals have been held at numerous locations outside Canada, including, the Federal Republic of Germany, the United Kingdom, the United States, Croatia, Cyprus and Syria. In addition, trials are regularly conducted on ships at sea outside the territorial waters of Canada.

b. Punishments

The scale of punishments that may be imposed in respect of service offences is set out in s. 139(1) as follows:

139. (1) The following punishments may be imposed in respect of service offences:

- (a) death,
- (b) imprisonment for two years or more,
- (c) dismissal with disgrace from Her Majesty's service,
- (d) imprisonment for less than two years,
- (e) dismissal from Her Majesty's service,
- (f) detention,
- (g) reduction in rank,
- (h) forfeiture of seniority,
- (i) severe reprimand,
- (j) reprimand,
- (k) fine, and
- (l) minor punishments,

and each of the punishments set out in paragraphs (b) to (l) shall be deemed to be a punishment less than every punishment preceding it.

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<sup>16</sup> National Defence Act, s. 71.

<sup>17</sup> National Defence Act, s. 66.

The minor punishments under s. 139(1)(1) are defined in the regulations as confinement to ship or barracks, extra work and drill, stoppage of leave, extra work and drill not exceeding two hours per day and a caution.<sup>18</sup>

The punishment imposed by service tribunals depends on three factors: the service offence charged, the type of service tribunal and the rank of the accused. First, each service offence has a maximum available punishment for that offence (eg. absence without leave-imprisonment for less than two years). Secondly, different types of service tribunals are restricted in the maximum punishment that those tribunals can award. Finally, the rank of the accused can determine the punishment awarded by the service tribunal. An officer cannot receive a punishment of detention. Instead an officer is only liable to the more serious punishment of imprisonment.<sup>19</sup> On the other hand, a non-commissioned member, above the rank of private who receives a punishment of imprisonment or detention is also subject to an included punishment of reduction in rank.<sup>20</sup> An officer receiving imprisonment does not receive that included punishment.

#### c. Service Tribunals

The disciplinary trial system is a two tiered structure consisting of summary trials and courts martial. Each tribunal

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<sup>18</sup> QR&O, art. 104.13.

<sup>19</sup> National Defence Act, s. 142(b).

<sup>20</sup> National Defence Act, s. 140(f).



ultimately has the same purpose of maintaining discipline in the armed forces. However, the two tribunals are different in many respects, including, their structure, trial procedures, post-trial review process and the frequency at which each type of tribunal is held. In 1988, there were 4,245 summary trials and only 95 courts martial. Between 1986 and 1988, summary trials, on average, accounted for 98% of the disciplinary proceedings conducted in the Canadian Forces.

There are three types of summary trials: trial by commanding officer, trial by delegated officer and trial by superior commander; and four types of courts martial: General Court Martial,<sup>21</sup> Disciplinary Court Martial,<sup>22</sup> Standing Court Martial<sup>23</sup> and Special General Court Martial.<sup>24</sup>

#### d. Courts Martial

Since this paper is concerned with summary proceedings there will only be a brief overview provided on courts martial. Courts martial are considerably different from summary trials and are more easily identified with civilian criminal courts. While courts martial are different in structure from a civilian criminal court, the procedures governing the conduct of a court martial are very

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<sup>21</sup> QR&O, Chap. 111, Sect. 3

<sup>22</sup> QR&O, Chap. 111, Sect. 4.

<sup>23</sup> QR&O, Chap. 113, Sect. 3.

<sup>24</sup> QR&O, Chap. 113, Sect. 4. This court martial may only try civilians who are subject to the Code of Service Discipline.

similar to civilian trials. That similarity is highlighted by the fact that civilian counsel appear regularly at courts martial with little need for familiarization with court martial procedure. The procedures followed at a court martial are well defined in QR&O.<sup>25</sup> An accused at a court martial has the right to be represented by legal counsel, and as a matter of practice military lawyers are offered as defending officers to all accused tried by that form of tribunal.<sup>26</sup> Codified rules of evidence, known as the Military Rules of Evidence are applied at all courts martial.<sup>27</sup>

Courts martial have considerably greater powers of punishment than summary trials.<sup>28</sup> They also differ from summary proceedings in that a judge takes part in the proceedings. The General Court Martial, Standing Court Martial and Disciplinary Court Martial all require the involvement of a military judge.<sup>29</sup> The procedure followed at the General Court Martial and Disciplinary Court Martial has similarities to a civilian jury trial, while the Standing Court Martial consists of a military judge sitting alone. The military judge attending at a General Court Martial and Disciplinary Court Martial is known as the Judge Advocate. The

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<sup>25</sup> QR&O, Chap. 112.

<sup>26</sup> QR&O, art. 111.60.

<sup>27</sup> QR&O, Appendix XVII, Rule 3.

<sup>28</sup> The maximum powers of punishment available to a General Court Martial is death, while Disciplinary Courts Martial, Standing Courts Martial and Special General Courts Martial each can award a maximum punishment of imprisonment for less than two years.

<sup>29</sup> QR&O, art. 111.22, 111.41 and 113.54.

judge presiding at a Special General Court Martial can be either military or civilian, however, in practice it is a military judge who presides at that trial.<sup>30</sup>

There is a right of appeal from courts martial to the Court Martial Appeal Court.<sup>31</sup> Provision exists for a further appeal to the Supreme Court of Canada.<sup>32</sup> In addition, there is an extensive non-judicial review process. Included in that review process is the convening authority for the court martial<sup>33</sup>, the Judge Advocate General<sup>34</sup> and the Chief of Defence Staff.<sup>35</sup> A person who has been found guilty by a court martial also has the right to petition for a new trial on the grounds that new evidence has been discovered subsequent to the trial.<sup>36</sup> Finally, a person who is sentenced to a period of detention or imprisonment by a court martial has the right to apply to either that court, or the Court Martial Appeal Court for release pending appeal.<sup>37</sup>

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<sup>30</sup> QR&O, art. 113.05.

<sup>31</sup> National Defence Act, s. 230. An appeal must be commenced by a Notice of Appeal delivered within thirty days of the termination of the court martial (s. 232(3)), however, the time for filing the appeal can be extended by a judge of the Court Martial Appeal Court (s. 232(4)).

<sup>32</sup> National Defence Act, s. 245.

<sup>33</sup> CFAO 111-1.

<sup>34</sup> National Defence Act, s. 246.

<sup>35</sup> National Defence Act, s. 247.

<sup>36</sup> National Defence Act, s. 248.

<sup>37</sup> National Defence Act, ss. 248.1, 248.2.

## 5. SUMMARY PROCEEDINGS

### a. Trying Officers: Commanding Officers, Delegated Officers and Superior Commanders

For the purposes of proceedings under the Code of Service Discipline a "commanding officer" is:

- a) an officer in command of a base, unit or element;
- b) an officer designated as a commanding officer by or under the authority of the Chief of Defence Staff;
- c) an officer in command of a geographically separated portion of a unit; or
- d) in the case of an accused who is a commanding officer the next superior officer to whom the accused is responsible to in matters of discipline.<sup>38</sup>

A "delegated officer" is an officer who receives a delegation of the commanding officer's powers of trial and punishment. A delegated officer cannot be below the rank of captain and must be serving under the command of the delegating commanding officer.<sup>39</sup> A "superior commander" is an officer commanding a command or formation, an officer of or above the rank of brigadier-general or any other officer appointed by the Minister for that purpose.<sup>40</sup>

It is the commanding officer who plays a particularly important role in the summary trial process. Not only are the majority of the summary trials held at the unit level (in 1988, 98% of all summary trials were held by the commanding officer, or by an officer exercising the delegated powers), but the commanding

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<sup>38</sup> QR&O, art. 101.01.

<sup>39</sup> QR&O, art. 108.10.

<sup>40</sup> QR&O, art. 110.01.

officer also has the power to issue search warrants<sup>41</sup> and determine if a service member will be retained in custody pending trial.<sup>42</sup>

b. Preparation and Laying of Charges

A charge is defined as a formal accusation that a person amenable to the Code of Service Discipline has committed a service offence. A charge is laid when it is reduced to writing on a charge report and signed by an officer or non-commissioned member authorized by the commanding officer to lay charges.<sup>43</sup> Every charge, regardless of whether it is ultimately dealt with by court martial or summary trial, must be initially recorded on a charge report (a copy of a charge report is enclosed at Appendix V). The charge report serves as the only written record of the procedures followed at a summary trial. Once the charge report is completed it is forwarded to a commanding officer or a delegated officer. All charges, in passing initially before the commanding officer or delegated officer, are reviewed to determine if they can first be dealt with by summary trial.

c. Investigation of Service Offences

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<sup>41</sup> QR&O, art. 107.07.

<sup>42</sup> QR&O, art. 105.21.

<sup>43</sup> QR&O, art. 106.01.



Investigations into service offences can take place both before and after a charge is laid.<sup>44</sup> The regulations provide that an investigation shall be conducted as soon as practical after the alleged commission of an offence.<sup>45</sup> If a charge has been laid then the investigation becomes mandatory. It should be ordered by the delegated officer or commanding officer to whom the charge report is referred. When completed the results of the investigation are communicated to the delegated officer or commanding officer to whom the charge report was referred.<sup>46</sup> The pre-trial knowledge by the commanding officer of the results of an investigation of an alleged offence is not limited to such an investigation. The commanding officer also has access to military police reports, and may even have ordered an administrative investigation into the alleged incident in the form of a summary investigation or a board of inquiry.<sup>47</sup>

d. Preliminary Disposition of the Charge

When a delegated officer concludes, upon review of the investigation, that a charge is not warranted, the charge report must be forwarded to the commanding officer for dismissal of the charge. A delegated officer has no power to dismiss a charge. However, if the delegated officer has jurisdiction and the

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<sup>44</sup> QR&O, art. 107.01.

<sup>45</sup> QR&O, art. 107.02.

<sup>46</sup> QR&O, art. 107.05.

<sup>47</sup> see QR&O, Vol. 1, art. 21.01, 21.07.

officer's powers of punishment are adequate the trial can proceed at that level. In any other case the delegated officer must refer the charge to another delegated officer having greater powers of punishment, or to a commanding officer. If the investigation is referred to the commanding officer that officer can order an additional investigation, cause the charges to be proceeded with or dismiss the charges.<sup>48</sup>

e. Assisting Officer

The accused does not have a right to representation by legal counsel at a summary trial. The participation of counsel rests solely in the discretion of the trying officer.<sup>49</sup> The accused does have a right to be represented by an assisting officer.<sup>50</sup> The assisting officer is an officer, or in exceptional circumstances a non-commissioned member above the rank of sergeant, who is appointed by or under the authority of the commanding officer. An accused may request a particular assisting officer. That request must be complied with if the exigencies of the service permit and the person requested is willing to serve in that capacity. The appointment of the assisting officer must be made as soon as possible after the charge is laid.<sup>51</sup>

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<sup>48</sup> QR&O, art. 107.12.

<sup>49</sup> QR&O, art. 108.03, note (C).

<sup>50</sup> QR&O, art. 108.03.

<sup>51</sup> Ibid.

In practice the assisting officer is usually an officer holding the rank of lieutenant or captain and most often is the officer immediately in command of the accused. The assisting officer is also usually, but not always, under the command of the trying officer.

The assisting officer assists the accused prior to, during and after the trial. The assistance provided is to the extent requested by the accused. Such assistance can include preparing the case, advising the accused regarding witnesses and other evidence, questioning witnesses and making representations on behalf of the accused.<sup>52</sup>

f. Types of Trial

i) Trial by Delegated Officer

A delegated officer has the jurisdiction to try non-commissioned members below the rank of warrant officer. The only service offences triable by delegated officer are those which can be termed as "minor" offences. Those minor offences are listed in Appendix VI. The powers of punishment available to a delegated officer are severe reprimand, reprimand, fine (\$200), confinement to ship or barracks (14 days), extra work and drill (7 days), stoppage of leave (30 days), extra work and drill not exceeding two hours a day (7 days) and a caution. The applicability of each punishment depends on the rank of the accused. For example, only

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<sup>52</sup> Ibid.

a private, can receive the punishment of confinement to ship or barracks.<sup>53</sup>

ii) Trial by Commanding Officer

The jurisdiction of a commanding officer is limited to subordinate officers (officer cadets) and non-commissioned members below the rank of warrant officer (sergeants and below). No commanding officer below the rank of major can try a subordinate officer. In addition, unless it is not practical for any other commanding officer to conduct the trial a commanding officer may not preside at a trial where that officer carried out or directly supervised the investigation, or issued a search warrant in relation to that case.<sup>54</sup>

A commanding officer has jurisdiction over all service offences except murder, manslaughter, sexual assault and child abduction cases, when those offences are committed in Canada. The powers of punishment available to a commanding officer are detention (90 days), reduction in rank, forfeiture of seniority (3 months), severe reprimand, reprimand, fine (60% of monthly basic pay), confinement to ship or barracks (21 days), extra work and drill (14 days), stoppage of leave (30 days), extra work and drill not exceeding two hours per day (7 days) and a caution. As with

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<sup>53</sup> QR&O, art. 108.10, 108.11, Table to art. 108.11.

<sup>54</sup> QR&O, art. 108.25.

the delegated officer the applicability of the punishment depends in part on the rank of the accused.<sup>55</sup>

iii) Trial by Superior Commander

A superior commander has the jurisdiction to try an officer below the rank of lieutenant-colonel or a non-commissioned member above the rank of sergeant.<sup>56</sup> The jurisdiction of a superior commander is further limited by CFAO 110-2 which recommends that majors only be tried by summary trial in cases involving minor traffic offences occurring outside Canada.

The superior commander has jurisdiction over the same offences as the commanding officer. The National Defence Act provides that a superior commander may impose a punishment of forfeiture of seniority, severe reprimand, reprimand and a fine.<sup>57</sup> However, QR&O limits the powers of punishment to a severe reprimand, reprimand and a fine.<sup>58</sup> Like the commanding officer the superior commander may also dismiss a charge.

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<sup>55</sup> QR&O, art 108.27, table to art. 108.27.

<sup>56</sup> National Defence Act, s. 164. That section provides that the jurisdiction of a superior commander can be extended to lieutenant-colonels, however, such authorization has not been provided by the Governor in Council at this time.

<sup>57</sup> National Defence Act, s. 164.

<sup>58</sup> QR&O, art. 110.03.



g. Trial Procedurei) Commencement of the Trial

Before the summary trial the trying officer must peruse the charge report to determine if that officer is precluded from trying the accused because of the accused's rank or status, the adequacy of the available powers of punishment or whether, in the opinion of the trying officer, it would be inappropriate for that officer to try the case having regard to the "interests of justice and discipline".<sup>59</sup> All the trying officers have the power to refer the case to another trying officer at the same level or to pass the case further up the chain of command.<sup>60</sup> In referring the case to higher authority, the commanding officer can recommend trial by court martial for any accused, or trial by superior commander for an accused who is above the rank of sergeant, but below the rank of lieutenant-colonel.

Charges are forwarded to a superior authority in substantially in the same manner as they are referred to an authority having power to convene a court martial (a "convening authority"). Instead of a charge report all of the charges are placed on a charge sheet.<sup>61</sup> In addition a summary of the evidence of each witness to be called against the accused is placed on a "synopsis". Prior to the referral of the charges the accused is given a copy of the charge sheet and synopsis, and is given 24 hours to decide

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<sup>59</sup> QR&O, art. 108.12, 108.28, 110.04.

<sup>60</sup> QR&O, art. 108.12(3), 108.28(3), 109.05.

<sup>61</sup> An example charge sheet can be found at QR&O, art. 106.15.

whether to make a statement. Accused amenable to trial by a superior authority is also asked if they want to have the synopsis read at the trial rather than have the witnesses called to testify.<sup>62</sup>

Should the accused agree to have the synopsis read at the trial then a unique situation is created where there is a written record available of the evidence upon which the trying officer bases the finding of the tribunal. At all other summary trials there is no requirement to prepare a record of the evidence heard at the trial.

ii) General Rules of Procedure

In comparison to the procedures followed at courts martial the procedures applicable to summary trials are neither detailed nor extensive. An outline of the procedures followed at summary trials is contained in QR&O, art. 108.29(1) which states as follows:

**108.29 - GENERAL RULES FOR TRIAL BY COMMANDING OFFICER**

(1) When a commanding officer tries an accused summarily, he shall conduct the trial in the presence of the accused, the assisting officer and, subject to paragraph (4) of this article, those members of the public who wish to attend. The commanding officer shall:

- (a) cause Part I of the charge report to be read to the accused;
- (b) when required, comply with the procedure prescribed in article 108.31 (Election to be Tried by Court Martial);
- (c) ask the accused whether he requires more time to prepare his case and grant any reasonable adjournment requested for that purpose;
- (d) ask the accused if he wishes to admit any of the particulars of the charge or charges and advise the

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<sup>62</sup> QR&O, Chap. 109.

accused that he is not required to make any admissions but if he does so his admission may be accepted as proof of any particular so admitted without further evidence being presented;

e) either direct that the evidence be taken on oath or inform the accused that he has the right to require that the evidence be taken on oath;

(f) receive such evidence as he considers will assist him in determining whether to

(i) dismiss the charge,

(ii) find the accused not guilty,

(iii) find the accused guilty, or

(iv) remand the accused to a higher authority;

(g) in such order as the accused may request, hear the accused, if he desires to be heard, and call such witnesses as the accused may request to be called and whose attendance can, having regard to the exigencies of the service, reasonably be procured, but nothing in this subparagraph shall require the procurement of the attendance of any witnesses, the request of whose attendance is determined by the commanding officer to be frivolous or vexatious;

(h) receive any further facts that should be brought out in the interests of the accused and any relevant

submission by or on behalf of the accused;

(j) unless he has dismissed the charge or referred the case to higher authority for disposal, make and pronounce a finding in accordance with articles 108.32 (Determination of Finding and Sentence By Commanding Officer) and 108.33 (Pronouncement of Finding and Sentence By Commanding Officer); and

(k) if he finds the accused guilty, determine and pronounce the sentence in accordance with articles 108.32 and 108.33.

These general rules are substantially the same for all types of summary trials, with the exception that a delegated officer does not have the power to offer the accused the right to elect court martial.

Even after the commencement of the summary trial all of the trying officers retain the power to refer the case to higher authority as long as that referral takes place prior to the pronouncement of a finding. The referral to higher authority can be made either because the trying officer considers it to be in the

best interests of justice or because their powers of punishment are determined to be inadequate.<sup>63</sup>

iii) Right to Elect Court Martial

The right to elect court martial only occurs if the accused is being tried by a commanding officer or superior commander. The manner in which the right to elect court martial arises depends upon whether the accused is charged with a "minor" offence (Appendix VI) or a "major" offence (Appendix VII). The right to elect court martial is given primarily at the start of the summary trial. If the accused is charged with a "minor" service offence then the trying officer must give the accused the right to elect court martial if that officer concludes, that if the accused should be found guilty, a punishment of detention, reduction in rank or a fine in the amount of \$200 would be appropriate. If the accused is charged with a "major" offence then the accused must be given the right to elect court martial regardless of the punishment the trying officer might consider appropriate should the accused be found guilty.<sup>64</sup> The accused is given at least 24 hours to decide whether the option will be exercised to be tried by court martial. If the election is made then the trial is adjourned and the case is forwarded to higher authority.

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<sup>63</sup> QR&O, art. 108.13(2)(a), 108.14, 108.29(2)(b)(ii), 108.30, 110.05(2)(b)(ii) and 110.06. If the trying officer is a superior commander having the power to convene or direct a court martial such an order can be made by that officer.

<sup>64</sup> QR&O, art. 108.31, 110.055.



The right to elect court martial may also be extended to accused at any time prior to a finding, if the trying officer determines that as a result of having heard the evidence the available powers of punishment may not be sufficient.<sup>65</sup> It is the responsibility of the assisting officer to advise the accused of the differences between remaining with the summary trial or electing court martial.

iv) Admission of Evidence

There are no rules of evidence applied at summary trials. The evidence may be viva voce or documentary. All forms of hearsay evidence may be admitted at a summary trial. In situations where the witness is not present at the trial the testimony can be admitted in documentary form (not necessarily by means of an affidavit if the evidence is not under oath) or even by a conference telephone call. Except in the case of a trial before a superior commander, where the synopsis of the evidence can be used at the trial, the only record of the summary trial is found on the face of the charge report.

v) Findings and Sentence

The standard of proof at a summary trial is proof "beyond a reasonable doubt".<sup>66</sup> If the accused is found guilty the sentence generally must be passed as soon as is practical. The exceptions

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<sup>65</sup> QR&O, art. 108.29(2)(b)(i), 110.05(2)(b)(i).

<sup>66</sup> QR&O, art. 108.15, 108.32, 110.07.



to this general rule occur when a commanding officer wants to award a punishment in excess of 30 days detention to a private, or a punishment of detention or reduction in rank to a non-commissioned member above the rank of private. In those cases the commanding officer must first seek approval of the punishment from higher authority.<sup>67</sup>

#### h. Review

##### i) General Considerations

Unlike the court martial system there is no right to appeal from a summary trial to a judicial body. The supervision of summary proceedings is carried out entirely by means of non-judicial review. Such review includes the approval of punishment warrants, a redress of grievance system, a mandatory review by officers in the chain of command and an ad hoc review by legal officers

##### ii) Approval of Punishments

A commanding officer must under certain circumstances seek approval from higher authority prior to awarding the punishments of detention or reduction in rank. While this "review" occurs prior to the passing of a sentence, it is included in this section because it is a review of the commanding officer's discretion in awarding punishments. The "higher authority" from whom authority must be sought is an officer not below the rank of brigadier

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<sup>67</sup> QR&O, art. 108.33.

general or an officer of the rank of colonel who has been designated as an approving authority by the Minister.<sup>68</sup>

In the case of a private who a commanding officer considers should be sentenced to a period of detention greater than 30 days, the trying officer commits the accused for that term. However, service of the portion in excess of 30 days detention is subject to the approval of the approving authority. If the offender is a non-commissioned member above the rank of private then the commanding officer must seek approval from higher authority of any proposed punishment of detention or reduction in rank. Unlike the case of a private, approval of the punishment awarded to an offender above the rank of private must be sought prior to the sentence being passed.<sup>69</sup>

The approval is sought by means of a punishment warrant which sets out the date of trial, the charges, a summary of the evidence, circumstances affecting the severity of sentence, particulars of the offender and recommendations of the commanding officer. There is no provision for any input by, or on behalf, of the accused regarding the approval of the sentence. When the commanding officer considers it appropriate the approval can be sought by more expeditious means, such as by telephone or message. A punishment warrant is then prepared and forwarded for written confirmation of the approving authority.<sup>70</sup>

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<sup>68</sup> National Defence Act, s. 163(3).

<sup>69</sup> QR&O, art. 108.33.

<sup>70</sup> QR&O, art. 108.40.

iii) Redress of Grievance

A service member dealt with by summary trial has the right to grieve the results of the trial by means of a "redress of grievance". A redress of grievance is a general grievance procedure provided for in s. 29 of the National Defence Act. Any officer or non-commission member may submit a grievance when it is considered "that he has suffered any personal oppression, injustice or other ill-treatment or that he has any cause for grievance".<sup>71</sup> The grievor may "as a matter of right seek redress" from superior authorities as prescribed in regulations. The complaint must be submitted in writing to the commanding officer. If the complainant requests, the commanding officer must detail an officer to assist in preparing the complaint. The grievance proceeds through each level of the chain of command with the final level of redress being the Governor in Council.<sup>72</sup>

iv) Mandatory Review

All charge reports and charge sheets from summary trials are forwarded for review purposes to the "next superior officer" of the trying officer. However, since the only record of trial that usually exists of a trial by delegated officer or commanding officer is the charge report this review is limited to errors on

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<sup>71</sup> National Defence Act, s. 29.

<sup>72</sup> QR&O, art. 19.26.

the face of the record (jurisdiction, wording of the charges, incorrect punishments and procedural errors).<sup>73</sup>

v) Review by Legal Officers

While not mandated by the National Defence Act, QR&O or CFAO a practice has developed where charge reports reviewed by superior officers and commanders of commands are referred to the legal officers who advise the applicable headquarters. However, this ad hoc system of review is limited to errors on the face of the charge report or charge sheet.

vi) Alteration of Punishments

Should a redress of grievance be granted or a review of the summary trial indicate an error in the proceedings there are a number of authorities who have the power to quash or substitute findings, and substitute, mitigate, commute, remit or suspend punishments. Those authorities include the Minister, the Chief of Defence Staff, the officer commanding a command and the commanding officer.<sup>74</sup>

vii) Release Pending Review

There is no provision under Canadian military law for an offender to be released from detention pending the outcome of a redress of grievance or review of a summary trial. As a general

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<sup>73</sup> CFAO 114-2.

<sup>74</sup> QR&O, Chap. 114.

rule, a punishment commences from the time at which it is awarded by the trying officer. As the redress of grievance and other grievance procedures are usually time consuming it is not uncommon for an offender to finish serving the punishment of detention prior to the completion of the review process.

#### 6. Judicial Review

In addition to the appeal (for courts martial) and non-judicial review procedures (for summary trials and courts martial) available under the National Defence Act a person subject to the Code of Service Discipline can, pursuant to s. 18 of the Federal Court Act<sup>75</sup>, apply for prerogative relief (certiorari, mandamus, prohibition, quo warranto or declaratory relief) in relation to service tribunals.

These prerogative remedies have only recently been applied with any frequency in a Canadian military law context. Under the British common law, prerogative writs were rarely issued by civilian courts in cases arising out of military tribunals.<sup>76</sup> The law developed along similar lines in Canada, as was noted by Mr. Justice Dickson (as he then was) in Martineau v Matsqui Institution Disciplinary Board (No. 2)<sup>77</sup>, where he referred to a traditional

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<sup>75</sup> Federal Court Act R.S.C. 1985, c. F-7.

<sup>76</sup> P.J. Rowe, "Military Justice Within the British Army" (1981) 94 Mil. Law Rev. 99 at 105-112. The granting of judicial review in the United Kingdom in relation to service tribunals still remains a rare occurrence.

<sup>77</sup> (1979), 50 C.C.C. (2d) 353 (S.C.C.) [hereinafter Martineau].



view of a "disciplinary exemption" that prevented the issuance of writs of certiorari in cases involving the armed forces, police and firemen.<sup>78</sup> However, Mr. Justice Dickson held, in a judgement concurring with the majority of the court, that there was no rule of law which exempted such disciplinary tribunals.<sup>79</sup>

A long history of the virtual exemption of service tribunals from judicial review by civilian tribunals by means of prerogative writs<sup>80</sup> was ended by Madame Justice Reed, of the Federal Court Trial Division, in Schick v. Canada (Attorney General) et al.<sup>81</sup>. She found that the Federal Court Trial Division could issue prerogative relief pursuant to s. 18 of the Federal Court Act. However, she noted that the power would probably be rarely exercised in relation to courts martial because of the existence of the Court Martial Appeal Court. While Madame Justice Reed did not mention summary proceedings, it is evident that the lack of another civilian court to supervise those service tribunals would result in the Federal Court Trial Division being the primary court from which a service member, being dealt with by summary trial, might seek relief. Since Schick<sup>82</sup> the Federal Court Trial Division has granted writs of prohibition in Glowczeski v. The Minister of

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<sup>78</sup> Ibid. at 374-375.

<sup>79</sup> Ibid. at 377.

<sup>80</sup> See MacKay v Rippon, [1978] 1 F.C. 233 (F.C.T.D.), Gregoire v Lieutenant General Paradis, [1981] 1 F.C. 471 (F.C.T.D.), and Re Corporal Brydges, [1982] 1 F.C. 728 (F.C.T.D.)

<sup>81</sup> [1986] 5 F.T.R. 82 (F.C.T.D.) [hereinafter Schick].

<sup>82</sup> Ibid.

National Defence et al.<sup>83</sup>, Fontaine v. Canada<sup>84</sup> and Veilleux v. Canada (Minister of National Defence) in matters arising out of summary trials. In Belzile v. R the Supreme Court of Nova Scotia Trial Division ordered release from custody pending resolution of a redress of grievance by means of a Writ of Habeas Corpus.

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<sup>83</sup> (1989), 26 F.T.R. 112 (F.C.T.D.) [hereinafter Głowczeski].

<sup>84</sup> (1990), 44 F.T.R. 266.

**B**

## HISTORY OF SUMMARY PROCEEDINGS

Lieutenant-Colonel K.W. Watkin<sup>1</sup>

The study of history lies at the foundation of all sound military conclusions and practice.

Alfred Thayer Mahan, 1840-1914<sup>2</sup>

1. INTRODUCTION

The word "summary" is defined in the Concise Oxford Dictionary as "compendious, brief, dispensing with needless details or formality, done with dispatch...."<sup>3</sup> This definition indicates that there are two elements to summary proceedings. They are carried out with little delay and are informal proceedings. This historical review explores the development of disciplinary proceedings in order to determine how the summary trial developed, and to assess the extent to which "summary" proceedings have been a necessary part of military law.

Since, like much of Canadian law, the Canadian military justice system evolved from British roots, particular attention will be paid to the development of British military law. Emphasis will also be placed on the background to the creation of the National Defence Act and its subsequent development to the present day.

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<sup>2</sup> R.D. Heinl, Jr., Dictionary of Military and Naval Quotations, (Annapolis: United States Naval Institute, 1966) at 148.

<sup>3</sup> Concise Oxford Dictionary 7th ed. (Oxford: Clarendon Press, 1982).

## 2. EARLY SUMMARY PROCEEDINGS

A form of military tribunal "for the trial of military offenders appears to have co-existed with the earliest history of armies".<sup>4</sup> Under Roman military law, which was largely customary, disciplinary jurisdiction was exercised at various levels of command. The commanding general (Consul, Praetor or Dictator), lieutenant-generals, military tribunes, centurions and principales all had the power to award punishments to subordinates. The scale of punishments included death, corporal punishment, dismissal with disgrace, reduction in rank and deprivation of pay.<sup>5</sup>

Among early Germanic tribes judicial proceedings were conducted by the Counts during peace and by the Duke or military chief, through delegation to priests, during times of war. Later there developed courts of regiments conducted by the Colonel or a delegated officer. The judicial authority of the delegated officer was demonstrated by a staff or mace called the regiment.<sup>6</sup>

The first written military codes of Europe appear to be the Salic Code (5th century) which was later revised by the Frankish Kings. Written military codes were also used by the Western Goths, Lombards, the Burgundians and the Bavarians. These codes were civil as well as military as the military commanders in war were

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<sup>4</sup> W. Winthrop, Military Law and Precedents, 2 ed. (Washington: General Printing Office, 1920) at 45.

<sup>5</sup> C.E. Brand, Roman Military Law (Austin: University of Texas Press, 1965) at 103-107. While in camp the commanding general sat in a judgment seat known as the "tribunal".

<sup>6</sup> Winthrop, Military Law and Precedents, *supra*, note 3 at 20-21.



also the civil leaders in peace.

### 3. OUR BRITISH ROOTS

#### a. General

Since Canadian policy, well into World War II, was to adopt British military law as its own, the history of British military law is, in effect, the early history of the Canadian military justice system. The military law applicable to the British land and air forces developed in a different manner than the law applied to its naval forces. Therefore, the naval law will be dealt with separately from the law governing land and air forces.

#### b. The Land and Air Forces

##### i) Middle Ages to Mutiny Act

During the Middle Ages there was often no clear distinction between civilian and military jurisdiction. The control of English feudal armies was exercised under courts of chivalry, curia militaris, which were brought to England by William the Conqueror in 1066. The commander of the royal armies, the Lord High Constable, sat as the superior judge. The court exercised both civil and military jurisdiction, however, during times of war the court followed the army dispensing summary punishment in accordance with military codes or articles of war promulgated by the Crown. Jurisdictional conflicts with common law courts resulted in restrictions being placed on the court of chivalry and by the 18th

century it ceased to exist as a military court.<sup>7</sup>

Even before the use of courts of chivalry had declined there was an increased use of military courts authorized by the various articles of war. These "councils of war" eventually evolved into the modern court martial. Many of the English Articles of War were patterned after the military Code of Articles of Gustavus Adolpus (enacted in Sweden in 1621).<sup>8</sup> The English Military Code of 1666 provided for three types of courts: a General Court Martial, a Regimental Court and a Detachment with the power of a Regimental Court. The Regimental Court set up for the trial of soldiers by their officers, but did not have jurisdiction over offences "punishable with life or limb".<sup>9</sup>

During the 17th century there was considerable conflict between the English monarchs and Parliament over the maintenance of armed forces in peace time. Commissions of Martial Law set up by Charles I were condemned by the Petition of Right (1628) and by the civil courts (1638).<sup>10</sup> In 1642, during the civil war both the Royal forces and parliamentary forces were governed by Articles of War. The struggle for control over the army intensified with the agreement by the Parliament of Restoration of 1660 for the

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<sup>7</sup> D.A. Schlueter, "The Court Martial: An Historical Survey" (1980) 87 Mil. L. Rev. 129 at 136-138.

<sup>8</sup> Winthrop, Military Law and Precedents, *supra*, note 3 at 19-20.

<sup>9</sup> C.M. Clode, The Administration of Justice Under Military and Martial Law, 2 ed. (London: John Murray, 1874) at 14.

<sup>10</sup> Ibid. at 4.

establishment of a standing army for Charles II.<sup>11</sup> With the abdication of James II (successor to Charles II) the new monarch, William of Orange and his wife Mary, were required to sign the Bill of Rights which, among other things, outlawed the keeping of a standing army within the country in times of peace without the consent of Parliament. In 1689, the question of the disciplining of military forces was again brought to the forefront when troops mutinied to join the forces of James II in Scotland. As a result Parliament quickly passed the first Mutiny Act.<sup>12</sup>

The pre-amble to the Mutiny Act is particularly instructive in that it indicates an understanding by Parliament that military justice had to be summary in nature. That preamble stated in part:

Whereas the raising or keeping a Standing Army within this Kingdome in time of Peace unlesse it be with Consent of Parlyament is against Law And whereas it is judged necessary by Their Majesties and this present Parlyament That durring this time of War severall of the Forces which are now on foote should be continued and others raised for the Safety of the Kingdom for the Common Defence of the Protestant Religion and for the Reduceing of Ireland And whereas noe man may be forejudged of Life and Limb or subjected to any kinde of Punishment by Martial Law or in any manner then by Judgement of his Peeres and according to the knowne and established Lawes of the Realm Yet nevertheless it being requisite for retaining such Forces as are or shall be Raised dureing this Exigence of Affaires in their Duty That an exact Discipline be observed and that Soldiers who shall Mutiny or Stirr up Sedition or shall Desert Their Majesties

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<sup>11</sup> Schlueter, "The Court Martial: An Historical Survey", *supra*, note 6 at 141.

<sup>12</sup> An Act for Punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service 1689, (U.K.) 1 Will. & Mary c. 5 [hereinafter the Mutiny Act]. See R.A. MacDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" (1985) 1 C. F. JAG J. 1 at 12.

Service be brought to a more Exemplary and speedy Punishment then the usuall Formes of Law will allow...  
(emphasis added)

The Act recognized that discipline had to be exact, and military offenders needed to be brought to trial speedily and without formality.

ii) Mutiny Act to 1879

Throughout the 18th century and well into the 19th century the discipline of military forces was governed by a combination of the Mutiny Act and Articles of War. In 1803, the Articles of War were given a statutory basis.<sup>13</sup> The three main types of military courts were: the General Court Martial, the District Court Martial and the Regimental Court Martial. The Regimental Court Martial was the most summary of the courts as it did not have to be authorized by a Royal Warrant. Instead, it was convened by the Colonel (commanding officer) under the authority of Articles of War first issued in 1672. The Regimental Court consisted of five officers (three officers could be used) and could sentence a soldier to corporal punishment, imprisonment for a period of 42 days and to forfeiture of pay. The sentence had to be confirmed by the commanding officer.<sup>14</sup>

While the Regimental Court Martial was "summary" in nature it did not meet the operational needs of the army. In the early 19th century the Articles of War were amended to authorize a "Detachment

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<sup>13</sup> Clode, The Administration of Justice, *supra*, note 8 at 58-59.

<sup>14</sup> Mutiny Act, s. 10.



General Court Martial" (to punish offences committed against inhabitants of a foreign country) and a "Drum Head" court to punish offences on the line of march. In addition, by custom, the Provost Marshal (forerunner to the military police) had the power to summarily execute offenders found at the scene of a crime.<sup>15</sup>

During the last half of the 19th century the summary powers of commanding officers were further increased as a result of concern over the conditions of service of the rank and file evidenced during the Crimean War, problems with recruiting and as a result of public pressure.<sup>16</sup> As R.A. Skelly wrote:

In general the tendency for much of the second half of the century was to extend the army officer's authority to mete out punishments of this nature. A similar process extended the summary jurisdiction of civilian magistrates, and the reasons in both cases were similar. Summary powers were increased to ease the burden on military courts, to speed the process of justice, and to provide alternative methods of punishment to imprisonment.<sup>17</sup>

The jurisdiction of the commanding officer was limited to cases of absence without leave and drunkenness.<sup>18</sup>

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<sup>15</sup> Clode, The Administration of Justice, *supra*, note 8 at 59-60, 181.

<sup>16</sup> Skelly, The Victorian Army At Home (Montreal: McGill-Queen's University Press, 1977) at 17.

<sup>17</sup> Ibid. at 140.

<sup>18</sup> Articles of War (1873), art. 32, 50, 77. See Clode, The Administration of Justice, *supra*, note 8, Appendix C at 262, 267-268, 273. The increase in summary jurisdiction did not necessarily mean that the punishments were still not harsh (eg. 7 days confinement to barracks for leaving a brush out on kit display). However, the punishments were considerably less severe than might be awarded by a court martial. See Skelly, The Victorian Army at Home, *supra*, note 15 at 139-140, 145-150.



It was these military tribunals and summary proceedings that were in existence in 1868 when the Canadian Parliament passed the Militia Act<sup>19</sup> adopting the "Rules and Articles of War" under British military law to govern Canada's armed forces.

iii) The Army Discipline and Regulation Act, 1879 to End of World War II

a) Military Justice Reform

The period from 1879 to 1945 was marked by a steady growth of the summary powers of military commanders. The increased use of summary punishments and an expanded summary jurisdiction for commanding officers continued the swing away from the use of courts martial started in the mid-19th century. As Skelly indicates:

In general punishment became milder. The military penal system made a transition between 1856 and 1899 from severe, even brutal punishments, towards those which were more lenient and humane. This move reflected an increasing sense of humanity and of concern for the individual soldier within the army, a response to public pressure and the exigencies of voluntary recruitment.<sup>20</sup>

In 1879, the Army Discipline and Regulation Act, 1879<sup>21</sup> was enacted to amalgamate the Mutiny Act and the Articles of War. Two years later that Act itself was to be repealed and replaced by the Army Act of 1881.<sup>22</sup> These new statutes retained the principle of

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<sup>19</sup> An Act Respecting the Militia and Defence of the Dominion of Canada, S.C. 1868, c. 40.

<sup>20</sup> Skelly, The Victorian Army at Home, *supra*, note 15 at 141.

<sup>21</sup> Army Discipline and Regulation Act, 1879 42 & 43 Vict. c.33.

<sup>22</sup> Army Act, 1881, (U.K.) 44 & 45 Vict., c. 58 [hereinafter The Army Act].

Parliamentary control of the armed forces by requiring the annual passage of an Act to bring the Army Act into force. In addition, the jurisdiction of military law was expanded to include most civil offences committed by soldiers in England.<sup>23</sup>

The Army Discipline and Regulation Act, 1879 provided for four types of courts martial: the General Court Martial, the District Court Martial, the Regimental Court Martial and the Field General Court Martial. The Field General Court Martial appears to have replaced the "Detachment General" court. The Act also removed the "Drum Head" court and summary powers of the Provost Marshal. There was no right of appeal from a court martial. Instead, the results of a court were "confirmed" by a senior officer acting as a confirming authority. Eventually, under the Army Act, the offender was provided a right to petition to a confirming officer or other reviewing authority.<sup>24</sup>

More significantly, the Army Discipline and Regulation Act, 1879 gave the commanding officer broad powers to award summary punishments. The commanding officer had the power to "investigate" charges against officers or non-commissioned soldiers. Where the case involved a soldier it could be dealt with summarily by the commanding officer. That officer could award imprisonment, with or without hard labour, (7 days); for an offence of drunkenness a fine (10 shillings); deduction from ordinary pay and minor punishments.

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<sup>23</sup> M.L. Friedland, Double Jeopardy (Oxford: Clarendon Press, 1969) at 348.

<sup>24</sup> Manual of Military Law 1929 (London: H.M. Stationary Office, 1929) at 67.

The Act also provided for the right of a soldier to request to be tried by district court martial in any case where the punishment to be awarded would involve imprisonment, a fine or deduction from pay.<sup>25</sup> While the time for exercising the right to elect was not clearly set out in the original legislation the Army Act later provided that the election was to be given "after the hearing of the evidence".<sup>26</sup>

While the commanding officer had limited power to award summary punishment under the Articles of War, the provision of general summary powers for the commanding officer, in the legislation of 1879, marked the beginning of two levels of trial under British military law: summary proceedings and courts martial. From this point on the two service tribunals were to develop along considerably different lines. The court martial was to become a more formal, procedurally more complicated and less used process. It was used to try more serious offences and to offer a "safety valve" for soldiers who preferred not to be tried by their

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<sup>25</sup> Army Discipline and Regulation Act, 1879, s. 46.

<sup>26</sup> Army Act of 1881, s. 46. The placing of the right to elect court martial after the hearing of the evidence in effect created a form of appeal. The accused would know that the trying officer had decided a finding of guilt was warranted and a punishment greater than a minor punishment was appropriate. As was set out in the Manual of Military Law, 1894 at 42:

35. There is no appeal from the award of the commanding officer, but, as has been already mentioned, the soldier may, in certain cases, instead of submitting to the jurisdiction of his commanding officer, claim to be tried by a district court martial.

commanding officers. As James Stuart-Smith (later Judge Advocate General (United Kingdom)) indicated, in an article entitled "Without Partiality Favour or Affection"<sup>27</sup>, courts martial had avoided allowing the involvement of counsel until the enactment of the reform legislation in the later 19th century.

Now the courts martial were thrown open to the lawyers and the voice of the Judge Advocate was no longer the only legal voice in the court-room. From 1881 onwards the trend has been to a closer and closer assimilation to the rules and procedures of the civil criminal court.<sup>28</sup>

The summary trial remained an informal process and eventually became the primary service tribunal used to maintain discipline in the British and Canadian Army.

b) Expansion of Summary Powers

The expansion of the summary powers of commanding officers did not end with the legislative reforms of 1879 and 1881. There was particular dissatisfaction with the time and effort consumed with the Regimental Court Martial.<sup>29</sup> The Regimental Court Martial was to eventually fall into disuse and by 1921 it was abolished entirely.<sup>30</sup>

By 1894, the general power of the commanding officer to award

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<sup>27</sup> (1963) 2 Mil. Law Rev. and Law of War Rev. 223 at 232.

<sup>28</sup> Ibid.

<sup>29</sup> Skelly, The Victorian Army at Home, *supra*, note 15 at 140-141.

<sup>30</sup> W.C. Rigby, "Military Justice in the British Commonwealth" (1942) Fed. Bar Rev. Journal 291 at 324-325.



imprisonment had been increased from 7 to 14 days.<sup>31</sup> In 1906 the punishment of detention was introduced. It was to be awarded, instead of imprisonment, to those personnel who were to be retained in the Army. At the same time the power of the commanding officer to award imprisonment was changed to the power to award detention.<sup>32</sup> By 1910 the amount of detention which could be awarded by a commanding officer was increased from 14 days in ordinary cases (21 days for absence without leave) to 28 days for all cases.<sup>33</sup>

The summary jurisdiction of military commanders was further expanded by the provision for the delegation of the commanding officers powers to officers commanding troops, batteries or companies and the granting of the powers of a commanding officer to an officer commanding a detachment of part of a unit.<sup>34</sup> By 1929, general officers had been given summary powers over officers below the rank of field officer (captain and below) or a warrant officer. This summary proceeding was the forerunner of the present day trial by superior commander.<sup>35</sup> This type of summary proceeding was developed to allow for the trial of a junior officer or warrant

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<sup>31</sup> Manual of Military Law 1894, (London: H. M. Stationary Office, 1984) at 40.

<sup>32</sup> Manual of Military Law 1914, (London: H. M. Stationary Office, 1914), The Army (Annual) Act, 1913, s. 44, note 7, at 418.

<sup>33</sup> Ibid. at 424, note 6.

<sup>34</sup> Manual of Military Law 1929, *supra*, note 23 at 40.

<sup>35</sup> Ibid. at 472-473. (Army Act, s. 47).



officer who committed an offence "which is not serious but yet cannot be overlooked."<sup>36</sup>

It was the system of summary proceedings developed primarily by 1929 that were used by the British Army during World War II. By virtue of the various Militia Acts passed by the Parliament of Canada, it was also those summary proceedings that applied to the Canadian army during that war.

iv) The Air Force

The history of military law relating to the air force is relatively brief in keeping with the recent origins of such military forces. During World War I, Canadian air force personnel flew with British units. The discipline of British air units was governed by the Air Force (Constitution) Act, 1917<sup>37</sup> which included the Air Force Act. The Air Force Act was basically a re-wording of the Army Act provisions to comply with air force terminology. Since that time the military law applicable to British air forces has remained virtually identical to the law governing the British Army.<sup>38</sup>

The Canadian air force did not come into being until April 1,

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<sup>36</sup> Ibid. at p 473, note 1. The use of summary proceedings avoided the stigma of being tried by court martial.

<sup>37</sup> The Air Force (Constitution) Act, 1917, (U.K.) 7 & 8 Geo. V, c. 51. The Air Force Act formed the Second Schedule to the Air Force (Constitution) Act, 1917 [hereinafter referred to as the Air Force Act].

<sup>38</sup> McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", supra, note 11, at 19.

1924. The Royal Canadian Air Force was created pursuant to an Order in Council passed under the authority of the Air Board Act.<sup>39</sup> That Order in Council provided that discipline would be maintained in accordance with the British Air Force Act, except where it was inconsistent with the applicable Order in Council. In 1940, a separate Royal Canadian Air Force Act<sup>40</sup> was enacted. However, it also incorporated the disciplinary provisions of the British Air Force Act.<sup>41</sup>

c. Naval Law

i) General

British naval law developed in a pattern similar to the law applicable to the land forces with two main exceptions. First, there was not the same conflict with Parliament over the control of discipline in the Navy. This situation was, to a large extent, a result of the lack of threat which the navy posed to Parliament, since as a "blue water" navy it was primarily tasked with extending military power outward from Britain.<sup>42</sup> Secondly, the military commander was given considerably more power and independence in enforcing discipline than any army counterpart. The greater powers

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<sup>39</sup> The Air Board Act, S.C. 1919, c. 11.

<sup>40</sup> Royal Canadian Air Force Act, S.C. 1940, c. 5.

<sup>41</sup> McDonald, "Trail of Discipline: Historical Roots of Canadian Military Law", *supra*, note 11 at 20.

<sup>42</sup> See C.G. Reynolds, Command of the Sea: The History and Strategy of Maritime Empires (New York: William Morrow & Co. Inc., 1974) at 12-13 for an explanation of the role of a "blue water" navy.

given to the naval commander were a direct result of the independent employment of naval forces away from Britain itself. This tradition of having greater independent powers available to naval commanders was to cause some problems when the amalgamation of Canada's military law was undertaken in 1950.

ii) Early Naval Law

In the early years of Britain's naval history the disciplinary system mirrored that of the land forces. The maintenance of discipline was governed by Articles of War. The trial of offenders was conducted under the authority of the Office of the Lord High Admiral, then by "councils of war" and finally by courts martial.<sup>43</sup> Legislatively, the navy was governed by An Ordinance and Articles Concerning Martial Law for the Government of the Navy<sup>44</sup> enacted in 1645, and subsequently by an Ordinance known as "the Duke of York's fighting instructions".<sup>45</sup>

A number of consolidations and amendments took place over the next two centuries. The Regulations of 1731 provided for the manner of conducting courts martial and set out Articles of War to be read to the ship's company once per month. Included in those Articles of War was the power of the captain of the ship to summarily punish seamen (not officers). The limit of the captain's

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<sup>43</sup> McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", *supra*, note 11 at 3-4.

<sup>44</sup> Lord's Journal, vii, 255.

<sup>45</sup> Clode, The Administration of Justice, *supra*, note 8 at 42.

summary powers was "twelve lashes on the bare back...according to the ancient practice of the sea".<sup>46</sup>

By the nineteenth century the navy was feeling the same pressures as the army concerning the need to reform its disciplinary system. In 1860, Parliament passed the Naval Discipline Act, 1860<sup>47</sup> which, after repeated amendments, was replaced by a new Naval Discipline Act, 1866<sup>48</sup>. It was this Act which formed the basis of Canadian naval discipline until near the end of World War II. The commanding officer had jurisdiction over all offences except capital offences and those committed by officers. The punishments which could be awarded at summary proceedings included imprisonment for three months (for deserters), imprisonment for six weeks (all other offenders) and solitary confinement for up to 10 days.<sup>49</sup>

As was indicated by Clode, in The Administration of Justice under Military and Martial Law<sup>50</sup>, the great distinction between naval and army courts in the 19th century was the broad power that the former possessed to order the immediate execution of sentences with little supervision from higher authority.

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<sup>46</sup> Ibid. at 43, n. 2.

<sup>47</sup> Naval Discipline Act, 1860 (U.K.), 23 & 24 Vict., c. 124.

<sup>48</sup> Naval Discipline Act, 1866 (U.K.), 29 & 30 Vict., c. 109 [hereinafter Naval Discipline Act, 1866].

<sup>49</sup> McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", *supra*, note 11 at 7.

<sup>50</sup> *Supra*, note 8 at 48.

iii) The Twentieth Century

In 1910, as Canada began to develop its own navy, the Canadian Parliament passed the Naval Service Act<sup>51</sup>, which incorporated British naval law. The Naval Discipline Act, 1866, as it was amended over the years, remained the basis of Canadian naval law until 1944, when Canada took a step towards independence by introducing its own naval disciplinary code. However, while the Naval Service Act, 1944<sup>52</sup> finally placed a Canadian stamp on the legal affairs of the navy, the Act was really an outright adoption of the provisions of the British Naval Discipline Act, 1866.

The Naval Service Act, 1944 provided for two types of courts martial: the Court Martial and the Disciplinary Court; and a summary trial before the commanding officer. Unlike the Army Act, the Naval Service Act, 1944 did not provide for either the confirmation of court martial proceedings or a right of petition from conviction. Instead, in cases where an offender received a punishment of imprisonment or detention an order of committal was required from the Minister, the Commander in Chief or the officer ordering the court martial.<sup>53</sup>

The commanding officer could only try non-capital offences. The jurisdiction extended to men, ratings (junior non-commissioned members), petty officers, chief petty officers and subordinate

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<sup>51</sup> The Naval Service Act, S.C. 1909-10, c. 43.

<sup>52</sup> Naval Service Act, 1944, S.C. 1944-45, c. 23 [hereinafter Naval Service Act, 1944].

<sup>53</sup> Naval Service Act, s. 114.



officers (midshipmen and officers undergoing training). The punishments which a commanding officer could award included imprisonment in a penitentiary or "elsewhere than in a penitentiary" (maximum of three months), detention (three months), dismissal, reduction, solitary confinement in a cell or under canvas, and more minor punishments.<sup>54</sup> The punishment imposed depended upon the rank of the accused. The commanding officer could also delegate the summary powers to another officer, however, the type and duration of the punishment awarded depended on the rank of the "designated" officer.<sup>55</sup>

There was no right to elect court martial. Instead, certain of the more serious punishments (including imprisonment, dismissal, detention, disrating etc.) required a punishment warrant to be approved by a senior officer.<sup>56</sup> The regulations also provided that an accused's Divisional Officer, or another officer be appointed to assist the accused before and during the trial.<sup>57</sup>

#### 4. THE NATIONAL DEFENCE ACT- 1950 TO PRESENT

##### a. Post War Review

Dissatisfaction with the military justice system, caused

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<sup>54</sup> King's Regulations Canadian Navy, art. 14.43, Table II [hereinafter K.R.C.N.].

<sup>55</sup> K.R.C.N., art. 14.09.

<sup>56</sup> K.R.C.N., art. 14.37.

<sup>57</sup> K.R.C.N., art. 14.20.

largely by the influx of a large numbers of civilians into the armed forces during World War II, prompted a post war review of military law in the United Kingdom, the United States of America and Canada.<sup>58</sup> The Canadian approach to the post war review was described by Group Captain J.H. Hollies in an article entitled "Canadian Military Law":

After the Second World War, the United Kingdom and the United States set up commissions to investigate and report upon the existing state of military law and its administration in the armed forces. Canada set up no such commission, but the Department of National Defence made a careful study of the existing legislation and watched with a great deal of interest and benefit the changes which were being proposed in the United Kingdom and the United States. As a result, new Canadian legislation was devised and enacted by the Parliament of Canada in 1950. This legislation is known as the "National Defence Act" and it brought within its ambit all three Canadian services. It provides for a single code of service discipline so that all three services are subject basically to the same law, terminates the application of the United Kingdom acts, extends the powers of summary punishment of commanding officers, and provides a right of appeal from the findings and sentences of courts-martial--among many other changes not relevant to this article.<sup>59</sup>

The National Defence Act, as enacted in 1950, provided for three types of courts martial: the General Court Martial, the

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<sup>58</sup> William T. Generous Jr., in his book Sword and Scales (Washington: National University Publications, 1973) at 15., indicates that the dissatisfaction centred on the harsh and inconsistent punishments that "grossly inexperienced" court members imposed on accused persons. He also indicates that "citizen-soldiers lawyers" were particularly concerned about improper command influence. See also D.A. Schlueter, "The Court Martial: An Historical Survey", *supra*, note 6 at 157-158, where it is indicated that American dissatisfaction with the military justice system started in World War I.

<sup>59</sup> J. H. Hollies, "Canadian Military Law" (1961) 13 Mil. Law Rev. 69 at 70.

Disciplinary Court Martial and the Standing Court Martial. A fourth court martial, the Special General Court Martial, was added in 1969.<sup>60</sup> The major changes with respect to courts martial were the creation of a right of appeal to a civilian tribunal<sup>61</sup>, and an automatic review of court martial proceedings by the Judge Advocate General.<sup>62</sup> The passage of the National Defence Act also marked the end of the largely "independent" status of naval law.

The most difficult task in preparing a unified Code of Service Discipline was resolving the different summary jurisdiction and powers of punishment available to military commanders. The final solution represented a compromise, which resulted in a reduction of the summary powers of naval commanding officers, but an increase in the summary jurisdiction of military commanders overall.

Despite initial attempts to introduce a separate naval summary trial system<sup>63</sup>, the final legislation established three types of summary trials: trial by commanding officer, trial by delegated officer and trial by superior commander. This trial system had elements of both the old navy (increased punishment-90 days

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<sup>60</sup> H.G. Oliver, "Canadian Military Law" (1975) 23 Chitty's L.J. 109 at 110.

<sup>61</sup> National Defence Act, S.C. 1950, c. 43, s.149. The right of appeal was originally to a tribunal known as the Court Martial Appeal Board. This board was replaced by the Court Martial Appeal Court in 1959 (see Oliver, "Canadian Military Law", *supra*, note 59 at 117).

<sup>62</sup> National Defence Act, S.C. 1950, c. 43, s. 197.

<sup>63</sup> See Special Committee on Bill No.133, An Act Respecting National Defence, "Minutes of Proceedings and Evidence", at 217-219.

detention, assisting officer, punishment warrants, trial of subordinate officers) and army (trial by superior commander, right to elect court martial) proceedings.

Naval commanding officers lost their power to summarily award a punishment of imprisonment. However, this loss was mitigated somewhat in 1959 by amendments to regulations governing service incarceration where the conditions of imprisonment and detention were made identical.<sup>64</sup> The considerable increase in the power of army and air force commanding officers to award detention (28 to 90 days) appears to have been largely a result of the need to reconcile powers of punishment of the various services. However, there is reference in background material to the Act that the increased summary powers were needed for the army because of the negative effect that holding courts martials had on operation effectiveness during World War II.<sup>65</sup>

b) 1950 to the Charter

During the first 30 years of the National Defence Act there were only two major changes to the summary trial system. In 1952, delegated officers were given the authority to award up to 14 days detention. As Colonel McDonald stated:

...COs were given authority to delegate powers of punishment of up to 14 days detention. Unfortunately, while committee debates on the NDA amendments in 1952 discuss the nature of the delegation authorized under the

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<sup>64</sup> See QR&O, Vol. II, Appendix XVI.

<sup>65</sup> National Defence Act: Explanatory Material, dated November 1, 1950, at 136 c).



amendments they do not provide any insight into the requirement for the increased power.<sup>66</sup>

This increase in punishment power, up from a maximum punishment of a fine of \$100,<sup>67</sup> continued the expansion of summary powers of military commanders.

The second change to the summary trial system involved the right to elect court martial. In 1959, in anticipation of the enactment of the Canadian Bill of Rights<sup>68</sup> the regulations were amended to expand the right to elect court martial to include any service member charged with a service offence that was also a criminal offence under civilian criminal law.<sup>69</sup> Previously, the right to elect court martial under the National Defence Act (but not under the Army Act) had only been available to non-commissioned officers (eg. not privates). The time at which the right to elect court martial was extended to the accused was changed from the end of the trial (after hearing the evidence) to the beginning of the hearing.<sup>70</sup> This made the right to elect court martial appear to be more of a form of waiver than a form of appeal.

c) Post Charter

In early 1982, in anticipation of the enactment of the

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<sup>66</sup> McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", *supra*, note 11 at 24.

<sup>67</sup> King's Regulations (Army), art. 108.11, Table.

<sup>68</sup> Canadian Bill of Rights, S.C., 1960, c. 44.

<sup>69</sup> B. Starkman, "Canadian Military Law: The Citizen as Soldier" (1965) 18 Can. Bar Rev. 414 at 430-431.

<sup>70</sup> Hollies, "Canadian Military Law", *supra*, note 58 at 77.



Charter, a Canadian Forces Charter Working Group was formed at National Defence Headquarters to study the effect of the Charter on the Canadian Forces and to recommend any necessary changes to the Code of Service Discipline and the regulations. The study by the Charter Working Group resulted in two series of amendments to military law. These changes were made in order to achieve a balance between the "Charter rights of individuals and the need to maintain the operational effectiveness of the CF".<sup>71</sup>

The first group of amendments, occurring in December 1982 and January 1983, involved changes to QR&O. Those changes were primarily to pre-trial and summary trial procedures. Among the changes was a further expansion of the right to elect court martial to include any service offence where the trying officer considers that if the accused were found guilty a punishment of detention, reduction in rank or a fine in excess of \$200 would be appropriate. In many respects this expansion of the right to elect court martial was a return to the election procedures previously available under the Army Act.

In addition, the power that a delegated officer had to award a punishment of 14 days detention was removed. The rationale behind that decision was explained by Colonel McDonald as follows:

One of the more controversial amendments has related to the powers of delegated officers. In 1982 a decision was taken, after consultation with representatives of the Commands, to remove the delegated officer's power to award detention. This was done in order to better comply

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<sup>71</sup> Statement by the Chief of Defence Staff contained in Canadian Forces Supplementary Orders announcing changes to QR&O. CFSO, 48/86 para 9.

with the provisions of the Charter by expanding access to a lawyer in cases where detention or a substantial fine might be awarded as punishment. The method of expanding access was to increase the right of the accused to elect court martial to include all cases where such punishments were possible. The delegated officers did not have the authority to offer the accused the right to elect trial by court martial. Therefore, the policy choice was between giving that power to the delegated officer or removing the delegated officer's authority to impose a sentence of detention. From the operational commander's point of view, the latter option was preferable.<sup>72</sup>

As a result only the commanding officer retained the power to award detention.<sup>73</sup>

The summary trial procedure was also made more detailed by providing for an adjournment to allow the accused to prepare the defence and giving the accused an opportunity to admit to particulars of the offence.<sup>74</sup>

The second group of Charter driven amendments occurred in 1986 and involved amendments to both the National Defence Act and QR&O. In terms of summary trials there were two main changes. First, the power of a commanding officer to try cases where that officer had carried out or directly supervised the investigation, or had issued a search warrant, was restricted to situations where it was not practical for another commanding officer to hear the case (eg. a

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<sup>72</sup> McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", *supra*, note 11 at 26.

<sup>73</sup> In effect the disciplinary system returned the delegated officers to the status they held during World War II (under the Army Act) and immediately after the enactment of the National Defence Act (up to 1952).

<sup>74</sup> QR&O, art. 108.13, 108.29, 110.05.

ship at sea).<sup>75</sup>

Secondly, the accused was expressly given the "right" to be represented by an assisting officer. The regulations were amended to specifically set out the duties of the assisting officer and provide for their involvement in the summary trial. However, the notes to QR&O indicated that the trying officer had the discretion to allow counsel to participate at a summary trial.<sup>76</sup>

The decision of the Court Martial Appeal Court in R v. Ingerbrigtsen<sup>77</sup> in 1990, and the decisions of the Supreme Court of Canada in R v. Genereux<sup>78</sup> and R v. Forster<sup>79</sup> in 1992, prompted a series of changes to the National Defence Act and QR&Os. Those changes were enacted to remedy defects to the court martial system relating to the independence and impartiality of those service tribunals.<sup>80</sup> However, these Charter based decisions have not to

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<sup>75</sup> National Defence Act, s. 141 (1.1).

<sup>76</sup> QR&O, art. 108.03.

<sup>77</sup> (1990), 61 C.C.C. (3d) 541.

<sup>78</sup> (1992), 70 C.C.C. (3d) 1.

<sup>79</sup> (1992) 61 C.C.C. (3d) 59.

<sup>80</sup> The Ingebrigtsen decision resulted in a series of changes were made to QR&O in December, 1990 and January, 1991. Those changes were designed to ensure the security of tenure for officers performing judicial duties at courts martial, insulate military judges and members of courts martial from possible command influence and enhance the financial security of military judges. The passage of Bill C-30, relating to mental disorder provisions of the Criminal Code, National Defence Act and Young Offenders Act, provided an opportunity to incorporate consequential amendments to the National Defence Act including changes to appeals from courts martial and a provision for the mandatory appointment of a judge advocate to a Disciplinary Court Martial. Finally, the Genereux and Forster decisions resulted in the passage of Bill C-77. That

date prompted similar changes to the summary trial system.

## 5. SUMMARY

The background to the Canadian military justice system is as rich and complex as that of its civilian counterpart. A common thread throughout its long history has been the requirement for a trial system which is more expeditious and less formal than the courts found in the civilian sphere.

An essential part of the military justice system has been the concentration of disciplinary power in the hands of military commanders. Regardless of whether the proceeding has been termed as a tribunal, council of war, Regimental Court Martial, summary investigation or summary trial, it has been the military commander, primarily at the level of the commanding officer, who has administered justice to the armed forces.

It is evident from the review of the birth of "modern" summary proceedings in the 19th century that summary trials were developed to fulfil a two fold purpose. First, they met the traditional need for a responsive and administratively simple means of dealing with disciplinary offences. Secondly, summary proceedings were created to provide a more "fair" proceeding than courts martials, particularly in terms of the level of punishments awarded to an offender.

The requirement for "summary" proceedings in the military was recognized by the British Parliament with the passage of the Mutiny

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Act and subsequent amendments to QR&O were designed to further enhance the independence of courts martial.

Act in 1689. That requirement was confirmed by the Canadian Parliament, in 1950, with the passage of the National Defence Act. The enactment of the Charter has caused the Government to make changes to the summary trial process. What remains to be determined is if those changes were adequate, both in terms of scope and effect, to adequately protect the rights of individual service members, while maintaining the operational effectiveness of the Canadian Forces.



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MILITARY LAW  
and  
COMBAT EFFECTIVE MILITARY UNITS

by

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In order to understand the theoretical as well as the practical basis of current military law, especially Summary court and other non-judicial options available to commanders at the lower end of the chain of command, it is necessary to understand how soldiers are motivated on the battlefield. This approach considers the motivation of soldiers on the battlefield to be the independent variable upon which other behavior or social processes such as legal systems must to some degree be dependent. The history of military law, especially in democracies, reflects the special and separate status accorded the military in applying military law. In general, such legal systems have deferred to military necessity and have agreed to special conditions and limits on individual freedoms and rights in separate military legal systems because of military exigencies. Additionally, issues of process make it essential that the military have a separate legal system. Civilian courts could not serve the military without severely limiting their function of enforcing "certain standards of behavior" necessary to maintain efficient operational units. For example, the establishment and operation of civilian courts overseas in all the areas that a nation's armed forces might be deployed is extremely impractical. Even if it were politically possible to establish civilian courts in other nations, the logistics of selecting and providing for judge and civilian juries overseas would be a major undertaking, and the logistical support required would, in many cases, detract from the military effort. Transporting all parties back to home

territory and civilian courts would also raise significant problems. For example, military operations would be hindered by the requirement for witnesses and portions of the chain of command to return for trials or scheduling trials so as not to interfere with military operations could affect the fairness of the proceedings. Perhaps more importantly the need for a separate system of military law also rests on the requirement that the persons involved realize the significance of the behavior involved for military operations. As DeVico (1966) points out, military members of a court would likely appreciate the seriousness of a soldier falling asleep on duty to a much greater extent than would a civilian court. This and numerous other examples pertaining to the unique circumstances of the military militate strongly for a separate military legal system.

However, military law has changed constantly throughout history, and it can always be questioned as to the current suitability and appropriateness of its structure and process, as well as its effectiveness in aiding military commanders field effective units. Perhaps the major consideration and starting point in conducting an evaluation of current structure, function, and effectiveness of a military legal system is a solid understanding of how soldiers are motivated in terms of understanding their behavior and how it may be influenced by military law.

The methods used by armies to motivate their soldiers and the supporting roles of military judicial systems have evolved

significantly through the centuries of recorded military history. While the structure and process of military legal systems have changed, historically the function of military law has always remained the same. "Dating from at least the time of the Roman Legions, the single and simple purpose of military law has been to render more effective the commander's fighting force by prescribing and enforcing standards of behavior for the members of the military force." (DeVico 1966)

The unchanged historical nature of the function of military law also appears to be applicable to the Canadian Military Justice System. Each Canadian "tribunal ultimately has the same purpose of maintaining discipline in the armed forces." (Watkin 1990) A detailed citation of legal reasoning, which could broadly apply in many nations, outlines the necessity of maintaining a separate military legal system with laws designed to assist it to "accomplish its mission" is presented in the recent US Supreme Court majority opinion of *Goldman v. Weinberger* (1986). Justice Rehnquist, writing for the majority, stated:

... we have repeatedly held that "the military is, by necessity, a specialized society from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). See also *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life," *Schlesinger v. Councilman*, *supra*, at 757, in order to prepare for and perform its vital role. See also *Brown v. Glines*, 444 U.S. 348, 354 (1980).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not



encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. See, e.g. *Chappell v. Wallace*, *supra*, at 300; *Greer v. Spock*, 424 U.S. 828, 843-844 (1976).

(POWELL, J., concurring); *Parker v. Levy*, *supra*, at 744. The essence of the military service "is the subordination of the desires and interests of the individual to the needs of the service." *Orloff v. Willoughby*, *supra*, at 92.

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. See, e.g., *Chappell v. Wallace*, *supra*, at 304. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." *Parker v. Levy*, *supra*, at 751. In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. See *Chappell v. Wallace*, *supra*, at 305; *Orloff v. Willoughby*, *supra*, 93-94. Not only are courts "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," *Chappell v. Wallace*, *supra*, at 305, quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "[J]udicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

Through the ages, armies have held to the necessity of maintaining separate military legal systems. Described in modern terms, armies, in their structure and process, have tended historically to structure military law on one of three control systems -- coercive, utilitarian, or normative (Etzioni 1975). Coercive motivation is based on the need of the individual

soldier to avoid deprivation, hardship, or pain to himself or someone he values. The limitations of this type of motivation are obvious. Modern warfare has made the control of troops in battle very difficult. Today, soldiers no longer enter combat under the watchful eye of sergeants and junior officers who are behind them with swords drawn. The dispersion, confusion, hardship, and danger of the modern battlefield has caused a significant downward shift in the organizational control of the soldier. To remain competitive on the battlefield, today's armies have been forced to move away from coercion and punishment as a primary means of control toward other methods.

Historically, utilitarian control within an army has been described as a mercenary army. In modern terms, this approach assumes that the soldier is an "economic man" who can be paid enough to do the tough jobs in an army, such as serve in the combat arms. This type of motivation involves a calculation on the part of the soldier that compares the tangible benefits and possible penalties with the ultimate choice of opting out if the going gets too tough. In an army where the primary motivation is utilitarian, the commitment of the soldier to his unit is not very strong -- no job is worth getting killed for.

Generally, the sanctions and punishments associated with coercive and utilitarian motivation have been severe. The history of military "justice" cites countless examples of the most inconsequential infractions of the rules or articles of war being severely punished. For example, even the lower courts of

the Swedish general Gustavus Adolphus in the middle ages exacted severe punishment for relatively minor offenses. At least one hangman was permanently assigned to each regiment. Historically it is possible to distinguish long periods and specific armies that were characterized by their primary reliance on coercive and utilitarian control systems.

Beginning with the lessons of World War One, it became apparent that the lethality of war would require that armies move toward a means of motivation that would produce disciplined soldiers that could reliably be counted on to behave as trained soldiers when away from the watchful eyes of the chain of command and exposed to the most intense danger and hardship.

As the primary motivation within armies evolved dependent upon battlefield lethality and the progress of other factors such as evolution of a nation's political and social culture, the legal systems that supported these armies also evolved.

The most powerful armed forces today rely primarily on a normative control system or motivation based on the soldier's personal commitment. The only reliable force on the battlefield potent enough to make a soldier advance under fire is his loyalty to a small group and the group's expectation that he will advance. It represents the internalization of strong group values and norms that result in the soldier conforming to unit expectations and goals. The legal systems supporting such armies provide essential support.

Armies organized to survive and win on the modern battlefield must be able to motivate and control the individual soldier in the most lethal of environments. Numerous recent UN "peacekeeping" missions and their very limited nature should not distract those responsible for preparing to meet capable and hostile armies on the field of battle. Modern warfare in a variety of scenarios, including war in modern Europe, in a third world jungle or in peacekeeping missions that could approach mid-intensity warfare requires that armies strive to achieve the highest levels of soldier cohesion and motivation and that complementary systems such as a nation's military legal system be structured to fully support commanders' efforts to create the most effective operational units.

The characteristics of modern battlefields make it essential that armies gain and maintain control of individual soldiers through a process of internalizing values and codes of behavior that cause the isolated soldier to act as a reliable and disciplined member of his unit in combat. In a well led unit, the primary source of the individual soldier's values and codes of behavior that control his daily behavior is the small group with a strong leader. Because the only force on the battlefield strong enough to make the soldier willing to advance under fire is his bond to the small group and the group's expectation that he will advance, it is a major task of the organization to control the individual soldier and the small group to which he belongs through its unit leaders. Strong and successful leaders



make use of many techniques and organizational resources such as military law in creating the strongly cohesive units described above. It is essential that the unit commander who has responsibility for creating cohesive, high performing units also personally have legal powers at the summary court and non-judicial levels.

The relationships between leadership on the battlefield, the creation of cohesive units, and the utilization of the powers available to leaders through the legal or military justice system is complex. An understanding of cohesion and the requisites for cohesion is necessary in order to understand the relationship. The significance of the small group or unit which influences much of the soldier's behavior, the leader's ability to control the group, and the leader's ability to utilize military legal powers in the creation and maintenance of unit cohesion cannot be overstated. This approach views the military commander's legal powers functionally, as a means of increasing his influence within his unit in order to build a cohesive and combat-effective unit. The immense advantages in warfighting that accrue to an army that fields highly motivated soldiers fighting under superb small-unit leaders can be reliably measured through the concept of cohesion as defined earlier.

The significance of cohesion for unit combat effectiveness and ultimately for winning wars is difficult to underestimate. The case for the importance of cohesion for combat effectiveness has been made earlier in a separate paper and in extensive



research since World War Two. Historically, the performance of soldiers in battle has often been referred to by terms such as morale, elan, or esprit de corps: For those vaguely familiar with military history, the historical recounting of significant human performance in battle is sometimes regarded as military folklore. However, beginning with World War Two, military researchers have been able to move beyond anecdotal accounts of soldiers in battle and underpin the behavior of the human element in war with increasing scientific validity and reliability.

In analyzing soldier performance in World War Two, Morris Janowitz, one of the earliest analysts to uncover the influence of the small group, concluded that any explanation of soldier behavior must recognize that, "even in the smallest unit there is an iron framework of organization which serves as a basis for social control. The single concept of military morale must give way, therefore, to a theory of organizational behavior in which an array of sociological concepts is employed." (Janowitz 1964) Other military researchers also investigating soldier motivation and control in different wars subsequently came to similar conclusions (Janowitz and Little 1965, George 1967, Henderson 1979, Moskos 1980, Kellet 1982).

Increasingly, explanations on soldier motivation in combat examine the relationship between the soldier, the primary groups and their relationship to the organization and its appointed leaders. Most investigators have pointed out that the concept of cohesion takes on an added sharpness under combat conditions. In

considering cohesion or the relationship between soldier, group, and leader, preparation for combat is associated with an increase in soldier group solidarity. This response to an external threat is a phenomenon that has been verified many times. When a threat and the necessity for meeting it are shared, an increase in group solidarity and usually a reduction in internal conflict occurs. Investigators of why soldiers fight, call attention, "again and again to the fact that the most significant persons for the combat soldier are the men who fight by his side and share with him the ordeal of trying to survive" (SLA Marshall 1947). Marshall summarizes the conclusions of most observers of men in combat in stating, "I hold it to be one of the simplest truths of war that the thing which enables an infantry soldier to keep going with his weapon is the near presence or the presumed presence of a comrade."

Most investigations of cohesion through the Vietnam war relied primarily on soldier interviews, although the "Fighter" series on combat motivation of American soldiers during the Korean War utilized some survey techniques. It was not until well after the Vietnam War that the US Army galvanized by the unraveling of US units in the later stages of the war, sponsored in-depth research on cohesion that resulted in valid and reliable measurements of the cohesion phenomenon in military units. Beginning in 1985, the US Army Walter Reed Army Institute of Research (WRAIR) began intense research among selected US Army combat battalions designed to measure trends in cohesion over

time. (Marlowe et al. 1987) . Eventually a series of five technical reports were issued reliably reporting measures of vertical cohesion (between leaders and soldiers) and horizontal cohesion (between soldiers) as well as other significant measurements.

In another major effort, the US Army Research Institute identified core soldier values that are primary determinants of soldier's day-to-day actions in high performing units (Siebold 1987). Measurement of these values reflected the degree of soldier bonding to each other (horizontal cohesion) and to unit leaders (vertical cohesion) as well as soldier and unit commitment.

These and other projects that measure cohesion have added immensely to the capability of assessing the potential of combat units. Perhaps more importantly, these measures can also be of significant assistance to leaders and policymakers charged with manning and maintaining a nation's armed forces. These measures, as well as prior research, provide decisionmakers with reliable knowledge capable of indicating the possible effects on combat effectiveness of policies being considered or of decisions in other areas such as those evolving from the legal system.

The legal system in the United States and Canada, and in many other countries, appears to provide vital support to the military leadership function of creating cohesive units. Research indicates that the support of the legal systems is essential in two vital areas if nations and their military

leaders, especially at the unit level, are to be successful in creating fully effective units. The legal system must ensure that soldiers serve according to the conditions of service and are not allowed to easily escape their duty. Second, it must provide commanders with the necessary legal authority supported by a carefully structured military justice system to effectively correct behavior, dysfunctional to the creation of cohesive and effective operational units.

Because of the relatively long time it takes to build highly effective and cohesive operational units, it is necessary that armies be organized with the same legal system in peacetime that they will rely on in times of war or operational deployment. For a "come as you are" war any attempt to shift from a legal system significantly different would likely slow down and hinder commanders' efforts to bring their units to the highest levels of cohesion and performance.

While research from numerous investigators in numerous wars concludes that cohesion is consistently the most powerful motivator of soldiers on the battlefield, it often does not recognize other social systems and processes that underpin and support armies as they create cohesive units. In this regard, the legal system is a major influence of soldier behavior that operates initially to get the soldier into the unit and also to keep the soldier in his unit, often in situations where the individual soldier strongly desires to be elsewhere. The danger, stress, and discomfort of military life are well known. Units



that do not have strong cohesion require influences that keep soldiers in the unit until effective leadership can create the cohesion characteristic of an effective operational unit.

Research indicates that "the soldier's calculation of his chances for escape" from threatening and uncomfortable situations is often dependent upon the strength of primary group attraction (cohesion) and by "anxiety producing doubts about his ability to leave his unit successfully" caused by concern about possible legal penalties, social isolation, and other such ambiguities (Little 1964).

The author has reported elsewhere on the affect of the legal system and other influences on a soldier's perceptions of successfully escaping the danger and discomfort of military life (Henderson 1985). In order to create the proper soldier attitudes to promote unit cohesion, "There must be no conflict within the soldier's mind concerning his personal reasons for remaining with his unit. The soldier must perceive no option other than service with his unit. Where the soldier thinks beyond his buddies and the group, he must be able to justify to himself, with minimum doubt, why he chooses to endure hardship and danger with his unit when a familiar civilian environment, offering comfort and safety, is nearby." If soldiers perceive that relatively harmless or ambiguous legal and administrative avenues of escape are open, or if soldiers believe the penalties for absence or avoidance of duty are relatively light, unit cohesion and combat effectiveness will be strongly and adversely



affected (Henderson 1985). To reinforce the soldier's motivation to remain where he is assigned, leaders should ensure that the soldier is aware of all legal, moral, and administrative barriers that separate him from the civilian world. Soldiers must be aware that society will exact significant penalties for being absent without leave (AWOL) and for dereliction of duty and will attach significant social sanctions for "bad paper" discharges and other legal punishments. If the organization is able to create significant legal and other doubts about the soldier's perception of successfully escaping from his unit, he will conclude that he is committed for the duration of his term of service and see his best chances of coping and survival as dependent upon the leaders and members of his immediate unit.

The second major area where a nation's legal system supports the military commander in creating highly effective units is through providing the leader necessary legal powers for the immediate correction of deviant behavior at the unit level. It is essential that commanders who have responsibility for developing highly effective, cohesive units also be vested with the requisite and appropriate legal powers to develop such units. This currently appears to be the case in the Canadian Forces where 98% of all summary trials were held by commanders or delegated officers (Watkin 1990). In the U.S. military, this level of legal recourse refers to Article 15 or Captains Mast procedures, summary court procedures, and to a lesser degree, special courts martials. The structure of these legal options

provide leaders the choice of a number of punishments and the ability to respond almost immediately within a unit in order to achieve the visibility necessary to promote behavior that supports cohesion while discouraging deviant behavior that adversely affects the leader's ability to produce high-performing units.

A major problem for any army, and especially for unit leaders at battalion level and below, is the possibility that primary group norms and rules of behavior that emerge in units can militate against the goals or mission of the unit (Shils and Janowitz 1948, George 1967, Little 1964, Etzioni 1961). Suggestive of these findings, Janowitz and Little reported in 1962 that "primary groups can be highly cohesive and yet impede the goals of military organizations. Cohesive primary groups contribute to organizational effectiveness only when the standards of behavior they enforce are articulated with requirements of formal authority." In units where deviant cohesive norms are operative, leaders are forced to rely on legal powers and punishment to a far greater extent than usual in situations where cohesion has developed around norms and behavioral rules that promote soldier behavior and actions congruent with unit objectives. The researchers noted above cite examples of deviant group behavior in armies dating back to the German Wehrmacht in World War II.

More recently, the US Army found itself facing problems of deviant cohesive behavior on a large scale that threatened to

unravel unit cohesion throughout the Army and seriously eroded the combat effectiveness of ground units in Vietnam. Decreased unit effectiveness in US Forces became most apparent after the 1968 TET offensive by the North Vietnamese Army (NVA) and continued into the 1970's. Years of Army personnel policies that relied on an individual replacement system that treated soldiers as "spare parts" to be put in and out of units every few months as well as other policies, such as the weakening of military commanders' legal authority under the Uniform Code of Military Justice eroded the leaders' ability to create and maintain unit cohesion. Given this weakened condition of the fabric binding US units together in Vietnam, subgroups began to emerge around deviant norms centered on drug subcultures and racial conflict. Leaders during this period were forced to rely to a greater extent on legal authority rather than the normative referent power more characteristic of leadership in strongly cohesive units. Unfortunately, during this period subsequent to 1968, the American public began to question the legitimacy of the Vietnam War on a wide scale, and this was soon reflected in appellate court cases that began to restrict the legal powers of commanders and demonstrated the significance of the commanders' legal powers necessary for maintaining operational effectiveness.

This short period lasting several years in US military history where commanders lost some support of the legal system and resulted in a diminution of legal powers, provided an excellent example demonstrating the requisite nature of legal

powers if military leaders are to provide effective military units. During the 1970's and early 1980's the Court of Military Appeals and other appellate courts temporarily turned away from a prior guiding principle that deferred to military requirements and held that soldiers give some of their individual rights while they serve. Under this principle, the priorities were clear; the rules were explained, and their enforcement by the chain of command and the military justice system was swift and fair.

Since the mid-1980's, the US courts appear to have returned to this prior principle of deferring to military necessity. However, during the brief hiatus noted above, the courts gave more priority to the individual and his rights over the needs of the service and operational effectiveness. As a result, the maintenance of discipline and cohesion suffered significantly (Moskos 1982). A number of court decisions during this period were particularly noteworthy. Among them, the US Supreme Court ruled that the Army did not have courts-martial jurisdiction over soldiers off-duty or off-post. This decision eroded significantly the commanders' ability to rely on the military justice system as a source of control over soldiers' behavior. The decision also reinforced the notion that military service can be compartmentalized into an eight-hour day and that the soldier was a civilian for the remainder of the day. This period of legal "civilianization" of the military was reinforced by the gradual application of civilian contract law to the soldier's conditions of service.



Further erosion of operational effectiveness resulted from rulings that prevented a commander from personally conducting searches of his unit for any purpose and then pressing charges against soldiers found violating the law such as unauthorized possession of drugs or weapons. Additionally, during this period, soldiers were allowed to bring suit against commanders attempting to maintain discipline such as a suit against the Army's urinalysis program to detect drug abuse. These and other similar rulings recast and significantly diminished the legal authority of commanders and the inherent influence over soldier behavior that is essential to the leadership role of creating cohesive and highly effective operational units.

To understand more fully the importance of the support a military leader requires from a well-structured system of military justice, it is necessary to understand how the leader influences soldier behavior in order to build cohesive units.

Leadership can be defined as "the phenomenon that occurs when the influence of A (the leader) causes B (the soldier/small group) to perform C (goal-directed behavior) when B would not have performed C had it not been for the influence of A (Henderson 1979). The primary function of the small unit leader within the leadership process is to bring about congruence between the objectives of the organization and the needs of the individual soldier. The leader must develop or direct internalized values and discipline within the soldier to enable the soldier to overcome fear and expose himself to enemy fire.



To accomplish this task, the leader must create and accommodate soldier needs by developing group norms within the unit that are strongly congruent with organizational goals. The effective leader brings about a similarity of values among soldiers, leaders and organization, so that such values become the primary guide for the soldier's day-to-day behavior. Leaders have available several bases of power that are the sources of influence that enable the leader to control and direct the unit (French and Raven 1973, Henderson 1985). The various sources of leader influence especially influential at smaller unit level have been labelled usefully as: reward and coercive power, legitimate power, referent power, and expert power. The first two are more closely associated with the legal system and derive much of their influence from the more formal legal powers delegated to military commanders.

To be of maximum effectiveness, the powers the commander derives from the legal system, especially the power to punish, should be related to group or unit norms. The leader's ability to focus group norms through the exercise of punishment is a source of tremendous leader power. It can threaten the soldier's group-based sense of security as well as the source of affection, esteem, and recognition in such a manner that significant group pressures become focused on the soldier to conform to group rules and behavior codes. These become significant factors in the process of building cohesive units and operational effectiveness. Especially important in this process are the sources of legal

power normally associated with the leadership of battalion, company, and platoon level units, the summary court and any delegated judicial power. These levels of leadership are most directly involved in the creation and maintenance of highly effective cohesive units and require the influence provided through summary trial and non-judicial powers to provide effective leadership. As noted elsewhere, the process of creating the conditions necessary for cohesion are best met when legal powers are appropriately exercised and "implemented within full view of the unit" by the commander and/or other officers within the chain of command. In addition to the visibility of punishment noted above and the timely involvement of unit leaders, soldier punishment must be related to the soldier's relationship with the group and group norms. This makes it essential that the chain of command have a wide number of types of punishment available in order that the punished soldier, as well as the immediate unit, conclude that the punishment is "just" in that it is congruent with group/unit norms and the expectation that any violation of these formal norms will be appropriately and swiftly sanctioned. The summary court and non-judicial punishment authority of commanders is designed to meet these requirements.

Legitimate power may be defined as compliance with orders because of soldier attitudes or beliefs that have their bases in a feeling of internalized "oughtness" or a sense of what is right or wrong based on learned cultural values that are reflected in a

nation's legal system. Soldiers respond to legitimate power much in the same manner that citizens respond to a policeman or citizens impersonally respond to recognized authority figures.

As noted earlier, this source of leader power is more appropriate to situations in which there has not been adequate time to create cohesive units such as upon massive mobilization and the impersonal leadership that necessarily exists initially in such situations. Legitimate power is also used more than the other bases of power in situations, such as the US Army experienced in the latter stages of Vietnam, where the requisites for cohesion became widely undermined in many units and the chain of command was forced to rely more on formal legal powers available to the lower end of the chain of command such as summary courts and non-judicial punishments in order to maintain discipline.

In summary, the evolution of military law has held constant the need to ensure military law supports and gives priority to the primary function of military law, that is to ensure that soldier behavior supports operational unit effectiveness. The structure and process of military law has changed significantly through the years. The changing manner of waging war, political and cultural forces, as well as other major factors have forced significant changes on military law. Nevertheless, the basic function of military law, enforcing standards of behavior to ensure discipline and operational effectiveness, has remained unchanged. The task of those responsible for adopting military

law to its changing environment appears to be primarily one of asking what structural and procedural changes are necessary if the primary function of military law is to be maintained and national efforts to field highly effective operational units is to be promoted.

Given the normative nature of leadership required to build cohesive units in today's armies, it is essential that commanders at the lower end of the chain of command who have first and primary responsibility for building cohesive units also be provided the requisite legal powers, especially at the summary court and non-judicial levels.



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D

Subject: Summary Trial: Does the U.S. experience offer any lessons for Canada?

To: D.E. Munro, Director General Personnel Policy  
National Defence Headquarters, Ottawa Canada

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Date: December 2, 1992

"There are many little crimes and disorders incident to soldiery, which require immediate punishment and which from the multiplicity of them, if referred to Court-Martials, would create endless trouble ...[commanders] ought to have a power to punish on the spot; subject to proper limitations and to such regulations, as the commander in chief according to customs and usages of war, shall, from time to time, introduce." George Washington (29 January 1778).<sup>1</sup>

#### INTRODUCTION

This paper will describe the origins and development of the U.S. military's system of nonjudicial punishment, which is comparable to your system of summary trial,<sup>2</sup> and derive conclusions of general application. This second portion of the paper discusses the implications if changes were to be made in the present national policy which presently minimizes formal external legal review of nonjudicial punishment. I will conclude by responding to the topics listed in your letter of August 7, 1992.

In discussing possible policy changes it is useful to recall Aaron Wildavsky's observation:

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<sup>1</sup> Writings of Washington, 376 (Fitzpatrick ed., 1932).

<sup>2</sup> The term "nonjudicial punishment" is used in United States military law to designate those disciplinary punishments, permitted by the Uniform Code of Military Justice, which a commander may impose "without intervention of a court-martial." Art. 15, UCMJ. In U.S. military law, a summary court-martial is a court-martial composed of one officer. The term "summary trial" is defined in a British context as "trial by any tribunal lesser than a court-martial." International Society for Military Law and the Law of War, Multilingual Glossary, Brussels, 1979. In French, the distinctions are "non-judiciaire: Répression non-judiciaire des fautes militaires (mineeures) comparable à la répression disciplinaire de certains droits continentaux; "proces sommaire: par un tribunal inferieur aux "Courts-martial." Ibid.

Policy is a process as well as a product. It is used to refer to a process of decision-making and also to the product of that process. Limiting oneself to policy as a product encourages a narrow view of rationality as presentation of results, a view that squeezes a disorderly world into the familiar procrustean formulation of objectives and alternatives. Restricting oneself to process, however, may lead to the opposite evil of denigrating reason, of being unable to account for either the creation of projects or their rationalization as public arguments.<sup>3</sup>

Although the historical narrative in the opening section will focus on law as a product, describing the statutory and regulatory changes which have evolved over time, I will portray those changes in a context which emphasizes the circumstances and institutions which initiated the change.

The United States military's experience with nonjudicial punishment should be relevant to Canada for several obvious reasons: both systems seem to share a jurisprudential bias toward the view - held by Grotius, Coke and Locke - that there are principles of right reason, of which custom is good evidence; both systems are derived from English military law; and both recognize the peculiarly important constitutional role played by the civil judiciary in protecting citizens' rights from encroachment by the central government.<sup>4</sup> I suspect that the differences between the two systems are more obvious to Canadians than they are to Americans: the relationship between the legislature and executive which, in matters military, is explicitly outlined in the U.S. Constitution;<sup>5</sup> the increasing tendency of Canadian political and

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<sup>3</sup> A. Wildavesky, *Speaking Truth to Power: The Art and Craft of Policy Analysis* (Boston: Little, Brown, 1979), p. 387.

<sup>4</sup> The Chief Justice of The U.S. Supreme Court observed thirty years ago: "It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government." Earl Warren, "The Bill of Rights and the Military" James Madison Lecture at New York University Law Center, February 1, 1962 p. 4.

<sup>5</sup> The President is "Commander-in-Chief of the Army and Navy" and of the militia in federal service. Art.II, Section 2. Clause 1. Congress has the power "To make rules for the Government and Regulation of the land and naval Forces." Art.I, Section 8, Clause 14.



judicial institutions to look to Continental European models; and the two nations' different experiences in their utilization of the military in the period following World War II. By summarizing the history of the development of the U.S. system I hope to give you the opportunity to compare and contrast the Canadian experience in evaluating the suitability (and shortcomings) of our system as an alternative model.

#### HISTORICAL DEVELOPMENT OF THE AUTHORITY OF COMMANDERS TO PUNISH UNDER U.S. LAW

When Colonel William Winthrop, "the Blackstone of American Military Law," published his *Military Law and Precedents* in 1886, he observed that "... our law recognizes no military punishments for the Army, whether administered physically or by deprivation of pay, or otherwise, other than such as may be duly imposed by sentence upon trial and conviction."<sup>6</sup> In doing so, he distinguished the Navy's practice, observing

It is quite otherwise in the Navy.... In the British Navy, here a similar authority exists, "courts-martial," according to Clode [*Administration of Justice under Military or Martial Law, As Applicable to the Army, Navy, and Auxiliary Forces*, by Charles M. Clode, 2d ed. Revised and Enlarged, (London: John Murray, 1874) (M.L.44) "are seldom resorted to." The power of summary punishment accorded to naval, but denied to army, commanders, is analogous to the authority to chastise or punish disorderly and disobedient seamen in the merchant service. See *Turner's Case* 1, Ware 77; *Bangs v. Little*, Id., 520.

As to the summary power of disciplinary punishment now vested in commanding officers of the army in the British Law, see *Manual* [*Manual of Military Law*, (The War Office, 1882)], 9 Army Act, ss.46, 138, Queen's Regs. Sec.VI.<sup>7</sup>

While circumstances have changed enormously in the century since Winthrop wrote, a summary of the two services' disciplinary systems before they were integrated in 1950 by The Uniform Code of Military Justice<sup>8</sup> suggests both the need for nonjudicial punishment and its potential for abuse.

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<sup>6</sup> (Washington D.C., Government Printing Office, 1920 ed.) 444, footnote omitted.

<sup>7</sup> 7. Ibid. n.64.

<sup>8</sup> Act of May 5, 1950, 64 Stat. 107. U.S. Marines were under the Naval Articles of War, while the Air Force, established in 1948, followed the Army's Articles.



1776-1946

Winthrop summarizes the first century of the Army's experience:

By the authorities nothing is more clearly and fully declared than that *punishments* [emphasis in original] cannot legally be inflicted at the will of commanders -- that they can be administered only in execution of the approved sentences of military courts. Such punishments ... have been repeatedly denounced in General Orders and the Opinions of the Judge Advocate General, and forbidden in practice by department commanders. Officers who have resorted, or authorized inferiors to resort, to them have not infrequently been brought to trial and sentenced, sometimes to be dismissed .... On the other hand, enlisted men tried and sentenced for insubordinate conduct, where such conduct has been induced or aggravated by illegal corporeal punishments inflicted upon them by superiors have commonly had their sentences remitted or mitigated, or altogether disapproved.

The practical result is the only discipline in the nature of punishment that, under existing law, can in general safely or legally be administered to soldiers in the absence of trial and sentence is a *deprivation of privileges* [emphasis in original] in the discretion of the commander to grant or withhold (such as leaves of absence or passes,) or an *exclusion from promotion* [emphasis in original] to the grade of non-commissioned officer, together with such discrimination against them as to selection for the more agreeable duties as may be just and proper. To vest in commanders a specific power of disciplinary punishment, express legislation would be requisite.<sup>9</sup>

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<sup>9</sup> Winthrop, note 6 supra, 444-446. Footnotes omitted. Congress had in fact given commanders the authority to punish certain minor offenses without trial. Article 2 of the Code of 1806, which related to irreverent or indecent behavior at worship services, provided for a graduated system of punishment for enlisted men: forfeiture (a sixth of a dollar for the first offense and for subsequent offenses) as well as twenty-four hours' confinement for subsequent offenses. Officers would be tried by court-martial and reprimanded. Article 3 of the Code of 1806 provided that an officer who used any profane oath or execration would forfeit \$1, while soldiers would incur the same penalties as for misbehavior at worship. Article 48 of the Code of 1806 authorized the reduction in rank of any noncommissioned officer who connived in the hiring of another to perform a soldier's duty. Officers who knew and allowed such practices would be court-martialed. These provisions had all been based on the British (continued...)

Thus, for most of the Nineteenth century the U.S. Army adhered to George Washington's belief: behavior which constituted a violation of the Articles of War could only be punished by court-martial. Serious offenses were tried before general courts-martial, while less serious offenses were heard by regimental or garrison courts-martial which did not have the power to try capital cases or commissioned officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for longer than one month.<sup>10</sup> A commander authorized to convene an inferior (regimental or garrison) court-martial might also serve as the prosecutor or accuser.<sup>11</sup> Winthrop cites numerous instances from General Orders<sup>12</sup> of incidents where soldiers were improperly punished without trial. He offers no reasons for this pattern of persistent violations and the only scholarly analysis of illegal punishments<sup>13</sup> covers the earliest period, from 1821 to 1835. The author draws on contemporary records to suggest that, while the physical isolation the garrisons and the consequent difficulty of convening courts-martial led officers to take the law into their own hands,<sup>14</sup> most cases involved punishment inflicted in the heat of passion, or simple sadism. The evidence he relies on suggests another reason as well: Army courts-martial were, between 1812 and 1833, not authorized to impose flogging as a punishment. In 1833, Congress responded to complaints from the officer corps and reinstituted flogging in the Army, but only after

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<sup>9</sup>(...continued)

Articles of War of 1765 and were, by the time of Winthrop's work, no longer enforced. Ibid, 611, 656. Article 25 of the Code of 1874 provided for the arrest of officers and the confinement of soldiers who used "reproachful or provoking speeches or gestures to another." This provision, based on the Codes of 1775 and 1776, was rarely utilized. Ibid. 590-591.

<sup>10</sup> Ibid. 480.

<sup>11</sup> Winthrop notes: "It is of course desirable that the officer constituting the court should not be the person from whom the charges emanate or who is the prosecuting witness in the case; but the requirements of discipline may sometimes necessitate that the two characters be united where the command is a small one or the exigencies of war enjoin immediate action." Ibid. 483.

<sup>12</sup> Ibid. 445 notes 69 - 73.

<sup>13</sup> Vargas, "The Military Justice System and the Use of Illegal Punishments as Causes of Desertion in the U.S. Army, 1821-1835", 55 Journal of Military History 1 (1991).

<sup>14</sup> Ibid. 10.



conviction of desertion.<sup>15</sup> Nearly all of Winthrop's examples involve corporeal punishment - usually flogging - for other offenses, which suggests that Army commanders resorted to illegal summary punishment because they concluded that courts-martial were unable to adequately and promptly punish minor offenders.<sup>16</sup>

As Winthrop reported, the Nineteenth Century Navy did not face the same problem. The Rules for the Regulation of the Navy of the United Colonies, approved on November 28, 1775<sup>17</sup> were, according to John Adams who drafted them, modelled on the British Naval Discipline Act of 1749<sup>18</sup> which permitted naval commanders to impose summary punishment in lieu of trial by general court-martial; the

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<sup>15</sup> Act of March 2d, 1833, "An Act to Improve the Condition of the Non-Commissioned Officers and Privates of the Army and Marine Corps of the United States, and to Prevent Desertion," 4 Stat. 647.

<sup>16</sup> In his discussion of the historical development of nonjudicial punishment Edward Byrne states: "Congress did not respond to the Army's needs for nonjudicial punishment authority. This failure encouraged commanders to issue general orders providing for instant, often harsh, punishment for such military offenses as disobedience of orders. Despite this unilateral action, Congress did not act. The later increase in the size of the Union Army during the Civil War also failed to budge Congress. Consequently, the Army commanders again used general orders to cover nonjudicial types of punishment. During this period the Army frequently resorted to such punishments as flogging, confinement, carrying a ball and chain, tying up by the thumbs, assignment of disagreeable duties, and staking offenders on the ground with molasses on their bodies, all without the use of courts-martial. Most of these standing orders authorizing nonjudicial punishments were apparently revoked during peacetime. As a result, President Grover Cleveland reported to Congress that the number of courts-martial in 1885 (14,000) was one-half the total numerical strength of the U.S. Army. He noted the minor nature of many of these offenses and requested Congress to provide an alternative to trial by courts-martial." *Military Law*, 3d ed. (Annapolis, MD: Naval Institute Press, 1981) 193. Congress' refusal to take action ultimately forced the Army to reconsider Winthrop's assumptions. See note 29 infra.

<sup>17</sup> III Journals of the Continental Congress, 1774-1789, 378-79.

<sup>18</sup> As to which version of the British Code was copied, compare Horan, "Flogging in the United States Navy - Unfamiliar Facts Regarding its Origins and Abolition," 76 United States Naval Institute Proceedings, 969 at 969-970 (1950) with Harold D. Langley, *Social Reform in the United States Navy, 1798-1862* (Urbana, Ill.: University of Illinois Press, 1967) 137-138.

Rules were reenacted in 1797 when the Navy was reconstituted,<sup>19</sup> modified slightly in 1799,<sup>20</sup> and again in 1800.<sup>21</sup> At "captain's mast," as summary punishment was known in the Navy, the captain

functioned as judge, jury, and executioner. The punishments he ordered were carried out on the spot, and there was no appeal to his rulings. If he chose, he could deny the accused a chance to speak in defense of his actions, and the statement. 'Seaman Jones, you were drunk -- twelve lashes' might be all the deliberation devoted to a particular case.<sup>22</sup>

The U.S. Navy did deviate from British practice by restricting flogging to 12 lashes as part of summary punishment and to 100 lashes as a consequence of court-martial.<sup>23</sup> The only history of early naval disciplinary practices observes:

Sentences at captain's mast depended heavily on the practice of flogging, which was abolished in the navy by an act of Congress in 1850. Unfortunately, Congress did not provide any alternative to the six to twelve lashes usually imposed for routine transgressions. Naval officers tried to devise alternatives of their own, but none seemed to have the detriment effect of flogging, except those penalties that could be imposed only by a general court-martial. Since it was manifestly impossible to court-martial every routine offender, the gap that appeared in the naval justice system threatened for a time to destroy naval discipline completely. Faced with this alarming prospect, Congress in 1855 created the summary court-martial, a tribunal more elaborate than captain's mast, but less significant than a general court-martial.<sup>24</sup>

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<sup>19</sup> Annals of Congress, 5th Cong., 1st sess., 1797.

<sup>20</sup> Ibid. 3915.

<sup>21</sup> Act of April 23, 1800.

<sup>22</sup> James E. Valle, *Rocks & Shoals, Order and Discipline in the Old Navy 1800-1861* (Naval Institute Press, Annapolis, Maryland, 1980) 37 (footnotes omitted).

<sup>23</sup> Buker, "Captain's Mast: Conservatism vs. Liberalism," *American Neptune*, XXXI: 139-146 (April 1970).

<sup>24</sup> Valle, note 22 supra at 55. Regarding the threat to discipline, see Charles O. Paullin, *Paullin's History of Naval Administration. 1775-1911*. (Annapolis, Maryland, the United States Naval Institute 1968), 231-234, cited by Valle.

After 1890, when Congress instituted summary courts-martial in the Army, the two service's Codes of Criminal Justice were similar: listing crimes and their respective maximum punishments in the punitive articles and establishing a system of courts-martial which gave commanding officers the power "to initiate charges, convene courts, appoint members and officers, and conduct a review of the proceeding."<sup>25</sup> Both Codes established a hierarchical system of courts: general courts-martial were reserved for the most serious offenses, and were composed of no less than five officers; a panel of least three officers - called a "special" court-martial in the Army, and a "summary" court-martial in the Navy - was established for less serious offenses and punishments; and, limited to two months' confinement, single officer courts - called "summary" in the Army and "deck" in the Navy - were expected to handle minor offenses.<sup>26</sup> The two disciplinary systems also showed signs of convergence over the issue of nonjudicial punishment.

The Army's belief, held for a century and articulated by Winthrop,<sup>27</sup> that a commander had no inherent authority to punish began to change. Not long after Winthrop's work was published the Army issued General Orders which permitted nonjudicial punishment.<sup>28</sup> Congress formally granted this authority to the Army in the 1916 Articles of War.<sup>29</sup>

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<sup>25</sup> William T. Generous, Jr., *Swords and Scales, The Development of the Uniform Code of Military Justice* (Port Washington, N.Y., Kennikat Press, 1973) 11.

<sup>26</sup> As to Navy Deck Courts see Pasley and Larkin, "The Navy Court-Martial: Proposals for Its Reform," 33 *Cornell Law Quarterly* 195 at 197 (1947).

<sup>27</sup> Note 6 supra.

<sup>28</sup> Miller, "A Long Look at Article 15," 6 *Military Law Review* 37 at 44 (1965).

<sup>29</sup> Article 104 of the Act of August 29, 1916, 39 Stat. 619, as amended by the 1920 Articles of War, Act of June 4, 1920, 41 Stat. 387. During his testimony on the 1916 proposal, The Judge Advocate General of the Army cited Winthrop's strictures and said: "Notwithstanding this view, the necessities of the service broke through the restraints of this legal principle and by regulation a system of disciplinary punishments in the Army was established. It seems impossible to administer an army without recourse to disciplinary punishment. We can not have recourse to a court in case of minor infraction .... The service wants this article very much. It is a daily need in our service. You can well imagine how impossible it would be to run West Point or Annapolis, or any great collegiate institution without what is called 'college discipline'; (continued...)



Art. 104. Disciplinary powers of commanding officers. - Under such regulations as the President may prescribe, [and which he may from time to time, revoke, alter or add to]<sup>30</sup> the commanding officer of any detachment, company, or higher command may, for minor offenses [not denied by the accused]<sup>31</sup> impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.<sup>32</sup> The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges (for not exceeding one week)<sup>33</sup> extra fatigue (for not exceeding one week)<sup>34</sup> restriction to certain specified limits (for not exceeding one week)<sup>35</sup> but shall not include forfeiture of pay or confinement under guard (except that in time of war or grave national emergency a commanding officer of the grade of brigadier general or higher may, under the provisions of this article also impose upon an officer of his command below the grade of major a forfeiture of not more than one-half of such officer's monthly pay for one month)<sup>36</sup> A person punished under authority of this article who deems his punishment

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<sup>29</sup>(...continued)  
and this applies there." Revision of the Articles of War, S. Rep. No. 130, 64th Cong. 1st Sess. 92-93 (1916).

<sup>30</sup> Deleted in the 1920 amendments.

<sup>31</sup> Deleted in the 1920 amendments.

<sup>32</sup> The term "demand" did not give the accused the right to a court-martial. As the Judge Advocate General explained in his 1916 testimony: "Unless the accused admits the offenses you can not do anything. He can avoid the application of this article if he desires. In the first place it has no application to him unless he says 'I am guilty;' and then it has no application to him if he demands trial by court-martial." S. Report No. 130, note 29 supra p. 93. The guilty plea requirement was be eliminated in 1920. Note 31 supra.

<sup>33</sup> Added by the 1920 amendments.

<sup>34</sup> Added by the 1920 amendments. Fatigue duty has been defined as "Occasional work performed by selected details of soldiers in addition to drill duties, especially policing, painting and camp maintenance." Webster's New Collegiate Dictionary, 2d ed. (1951). The same work defines policing as "The act or process of putting in order a camp or garrison."

<sup>35</sup> Added by the 1920 amendments.

<sup>36</sup> Added by the 1920 amendments.

unjust or disproportionate may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have authority to remit or mitigate any unexecuted portion of the punishment. The imposition and enforcement of any disciplinary punishment shall not be a bar to trial by court-martial for a crime growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

In their discussion of the disciplinary power of the commanding officer, the writers of *The Manual for Courts-Martial, U.S. Army, 1928* emphasized that the authority of the commanding officer could not be delegated, and that the term "minor offense" "includes derelictions not involving moral turpitude or any degree of criminality or seriousness than is involved in the average offense tried by summary court-martial."<sup>37</sup>

#### 1946-Present

Nonjudicial punishment provisions in the Army and Navy Codes were unchanged in World War II. However, when the court-martial system came under review in the aftermath the War, all the Articles' terms were considered for revision. The reasons for revision are summarized in the definitive history of the Uniform Code of Military Justice:

Official concern echoed ... popular displeasure [with the Articles]. It was apparent to most high officials within the military departments that the court-martial system, which had worked well enough for the small, compact, prewar Navy and Army, displayed major weaknesses under the stress of wartime expansion. During the interwar years, the services had been composed almost entirely of Regulars, both officers and men. Because of the small numbers, there could be a leisurely and thorough orientation for enlistees, allowing them to become familiar with their rights and obligations. Similarly,

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<sup>37</sup> (Washington D.C., Government Printing Office, 1943 ed.) 103, para. 105. *The Manual for Courts-Martial 1951*, published after passage of the Uniform Code of Military Justice contains almost identical language at pages 229 ff.; the language has been retained in subsequent versions. It should be noted that the 1920 amendments, which permitted an accused to assert his innocence in the nonjudicial punishment proceeding rather than requesting trial by court-martial, paralleled the Navy's post Civil War practice of permitting "not guilty" pleas at Captain's Mast.

officers in the peacetime military were highly trained professionals, who considered it one of their primary duties to conduct a skillful court-martial, whether as court-member, prosecutor, defense counsel, or even law member. But these conditions were destroyed in the fast-paced mobilization that came with the war, and the result was creaking and groaning in the framework of the ancient system.

The Navy and War Departments themselves had an interest in correcting defects in the machinery because disciplinary problems were a serious manpower drain. In the first place, a major share of the offenses committed by servicemen were unauthorized absences of one form or another. Another form of manpower loss occurred when a man was convicted by court-martial. Sentences including confinement or punitive discharges also cost the military badly needed men. Moreover, the services as institutions were acutely aware of the role morale plays in the efficiency of a combat unit and were therefore quick to investigate anything that might be responsible for the lowering of that precious commodity.<sup>38</sup>

Numerous groups studied the military justice system but few recommended changes in the provisions for nonjudicial punishment.<sup>39</sup> When the Uniform Code of Military Justice was passed in 1950, it provided for nonjudicial punishment in Article 15, entitled "Commanding officers non-judicial punishment":

(a.) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial -

(1.) upon officers and warrant officers of his command: [maximum punishments specified]

(2.) upon other military personnel of his command: [maximum punishments specified]

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<sup>38</sup> Generous, *Swords and Scales*, note 25 supra at 16-17. A footnote, reporting that 80% of all Naval court-martial convictions and a little over one third of all Army convictions were for unauthorized absence, has been omitted. The difference between the two services is not explained although it may be due to the fact that a brief absence which in the Army might be handled through nonjudicial punishment could in the Navy be considered the aggravated offense of missing a ship's movement.

<sup>39</sup> Perhaps the most noteworthy was that made by the Elston Subcommittee of the House Armed Services Committee which, in its revision of the Army's Articles of War, recommended an increase in the severity of punishments which could be imposed on officers. H.R. 2575, passed by the House of Representatives in January 1948.



(b.) The Secretary of Defense may, by regulation, place limitations on the powers granted by the article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise such powers, and the applicability of this article to an accused who demands trial by court-martial.

(c.) [providing that officers in charge may impose nonjudicial punishment on enlisted members of their unit.]

(d.) A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority shall have the power to suspend, set aside, or remit any part or amount of the punishment and to restore all rights, privileges, and property affected.

(e.) The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offenses growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused at trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.<sup>40</sup>

The Code's provisions masked some fundamental differences between the services: "although the Army treated NJP like an administrative task, it permitted appeal from this utterly nonjudicial affair to a court-martial, which had the power to hand down a federal conviction. But one of the reasons the Navy refused to grant the right of election was that it considered mast a disciplinary matter, not a criminal one, and therefore not suitable for a trial by court-martial."<sup>41</sup> Nonjudicial punishment in the Army would be normally be administered by relatively inexperienced company commanders, while in the Navy a ship's commander would usually be the person imposing punishment, hence the different attitudes toward the right to appeal. In its final version, Article 15 curtailed the punishment authority of naval commanders, while giving the Services the right to issue regulations which would recognize the two different traditions.

As is the case whenever there is radical legal change in the law, affected institutions made changes in their practices which were unforeseen by the Code's drafters. In order to eliminate

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<sup>40</sup> Act of 5 May 1950, note 8 supra.

<sup>41</sup> Generous, *Swords and Scales*, note 25 supra at 124.



servicemen who proved to be unsatisfactory, the Services shifted from courts-martial, which granted "punitive" discharges, to administrative proceedings which could summarily release individuals who were either unsuitable or unfit. Unsuitability was described as "he would if he could, but he can't," while unfitness was utilized when "he could if he wanted to, but he won't." As punitive discharges decreased, there was a corresponding increase in administrative discharges. Typically the grounds for discharge were a series of minor infractions, evidenced by a record of nonjudicial punishment.<sup>42</sup>

Perhaps the most noteworthy distinction between courts-martial and nonjudicial punishment was - and is - the absence of any statutory requirement for lawyers in the latter process. Lawyers were required in general courts-martial: to represent the accused; to serve as "law officer (Judge);" to advise the commander as a prerequisite to reference to trial, and approval of the findings and sentence; and to serve as a "Board of Review," in all cases involving a conviction and punitive discharge. Initially, lawyers were not required in special courts-martial unless the government sought a punitive discharge, nor were lawyers required in summary courts-martial.

Subsequent amendments to the Uniform Code of Military Justice, changes in case law, and regulatory requirements have enhanced the role of lawyers in the military justice system: by requiring a "Miranda right to counsel" warning before interrogation; permitting an accused to request trial before a judge alone in special and general courts-martial; making available law qualified counsel; and enhancing the role of the Boards of Review. There has not been a similar development in the rules relating to nonjudicial punishment. *Miranda* warnings may not be required when a commander asks an accused if nonjudicial punishment will be accepted; the commander imposing punishment need not be a lawyer nor have

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<sup>42</sup> This is still the case. 10 U.S.C. 1169 provides that "no enlisted member of an armed force may be discharged before his term of service expires, except (1.) as prescribed the Secretary concerned; or (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law." Utilizing (1), the Secretary of the Army has issued AR 635-200, which prescribes the procedures governing the discharge of enlisted personnel and which, at paragraph 3-8 "Limitations on characterization "of Service" directs that, among the factors to be considered;...f."(5) Whether there has been disciplinary action under UCMJ, Article 15; if so, list the specific offenses which resulted in such action." Various statutes govern the administrative elimination of officers, which is governed by AR 635-100 and which also provides that punishment under Article 15 UCMJ should be considered in determining whether an officer is substandard in performance or deficient in character.

received legal advice (although in practice many seek such advice); the accused by regulation may be offered the right to counsel, who need not be law qualified.<sup>43</sup>

The maximum punishments would could be imposed under Article 15 were increased by Congress at the Services' behest, and became effective in 1963. A concurrent proposal to eliminate the summary court-martial died without action although the court is now rarely used.<sup>44</sup>

On January 11, 1973 the Secretary of Defense issued a memorandum, entitled "Report of the Task Force on the Administration of Military Justice in the Armed Forces," directed to the Secretaries of the Military Departments and instructing them to revise their nonjudicial punishment procedures to require:

- a. The availability of adequate legal advice to an accused person prior to action by commanders authorized to impose punishment. [The Army and the Air Force required consultation with a lawyer. The Navy and Marine Corps required consultation with a lawyer unless: counsel is waived; or the accused is attached to or embarked in a vessel; or the command does not intend to use the nonjudicial punishment record in a later court-martial; or the accused is actually represented by a lawyer serving as personal representative at the nonjudicial punishment hearing.]<sup>45</sup>
- b. The opportunity for full presentation by an accused person of his case in the presence of his or her Commander, to include but not limited to the right to call witnesses, present evidence and to be accompanied by a person to speak on his or her behalf;

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<sup>43</sup> See note 45 infra.

<sup>44</sup> The decline of the summary court-martial is illustrated by the following statistics:

Army Summary Courts-martial: 1962: 43,542 (before Amending Article 15); 1964: 28,616 (after punishment authority was enhanced); 1991: 931. 1960's statistics are drawn from Generous, Swords and Scales, note 25 supra at 151; 1991 statistics (the latest available) are drawn from Annual Report Submitted to the Committees on Armed Services... for the Period October 1, 1990-September 30, 1991, (U.S. Court of Military Appeals Washington DC: n.d.), p. 43.

<sup>45</sup> This policy that no lawyer is Constitutionally required is based on an interpretation of Middendorf v. Henry, 425 U.S. 25 (1976) which had held that the Constitution did not require assignment of a defense counsel to a summary court-martial. The Navy's policy was affirmed by the Court of Military Appeals in United States v. Mack, 9 M.J. 300 (CMA 1980).



- c. That each accused person be advised of his or her right to appeal any nonjudicial punishment;
- d. That imposition of punishment... be stayed pending completion of any appeal filed;
- e. That nonjudicial punishment proceedings be opened to the public when requested by an accused except in those instances where military exigencies or security interests preclude public disclosure.<sup>46</sup>

There have been no statutory changes, nor major revisions in the service regulations since that time. In the last decade military case law applying Article 15 has fallen into three categories: interpreting the provision which allows subsequent court-martial for any offense arising out of the same incident; applying the provision that permits utilization of the record of nonjudicial punishment in the sentencing portion of a trial; and resolving evidentiary problems regarding the use of NJP records in a subsequent court-martial to establish facts during the case in chief. None of these issues have any particular relevance to your inquiry, nor do several federal court decisions involving collateral attacks on Article 15.<sup>47</sup> Although several academic commentators<sup>48</sup> criticized the Supreme Court's statement in *Middendorf v. Henry* that "Article 15 punishment, conducted personally by the accused's commanding officer, is an administrative method of dealing with the most minor offenses"<sup>49</sup> there have been no successful constitutional challenges to the Code's provisions regarding nonjudicial punishment.

#### LESSONS FROM THE U.S. EXPERIENCE

##### A. The Goal of Punishment

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<sup>46</sup> The memorandum is reprinted in Byrne, *Military Law*, note 16 supra at 237.

<sup>47</sup> See e.g. *Dumas v. United States*, 620 F.2d 247 (Ct. Cl. 1980), *Cappella v. United States*, 624 F.2d 976 (Ct.Cl.1980) (distinguishing *Hagarty v. United States*, 449 F.2d 352 (Ct.Cl.1971) and *Wales v. United States*, 14 Cl.Ct. 580 (1988)).

<sup>48</sup> See Note, "A Sixth Amendment Right to Counsel Under Article 15 of the Uniform Code of Military Justice," 72 Mich. L. Rev. 1431 (1974); Note, "Nonjudicial Punishment in the Navy: Do the Rights to Counsel and Due Process Stop at the Water's Edge?", 48 U. Colo. L. Rev. 489 (1977); Note, "The Unconstitutional Burden of Article 15," 82 Yale L.J. 1481 (1973) and Imwinkelreid, "The Unconstitutional Burden of Article 15: A Rebuttal," 83 Yale L.J. 534 (1974).

<sup>49</sup> 425 U.S. 25, 31-32 (1976).

Every military commander has, in the words of George Washington, seen the need to "punish on the spot" those "little crimes and disorders incident to soldiery which require immediate punishment and which from the multiplicity of them would create endless trouble if referred to Court-Martials."<sup>50</sup> But punishment involves the infliction of pain of some sort, and the need to inflict pain obviously needs justification. Punishment may be justified for its deterrent effect, for the opportunity it offers to rehabilitate the offender, to remove the offender from society because of the threat he poses, or to express society's disapproval of the offender's behavior. While these goals are not necessarily disjunctive, the kind of punishment imposed will reflect the primary purpose of the authority administering the punishment.

All the evidence indicates that nonjudicial punishment in the Nineteenth century U.S. Army and Navy was intended to deter. Flogging and other forms of corporal punishment were intended to discourage repeat offenses by the same individual or the same offense by others. Enlisted men in the regular Army and Navy were drawn from the lowest social stratum, many were immigrants, unable to speak or understand English. Their officers considered them to be no better than brutes and treated them accordingly.<sup>51</sup> The influx of volunteers during the Civil and Spanish American Wars had no apparent effect on the philosophy of punishment.<sup>52</sup> However, in consequence of the experiences of volunteers and conscripts during World War I, the court-martial system, and the philosophy of punishment on which it was based, was slowly modified, first in

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<sup>50</sup> Note 1 supra, order of text rearranged.

<sup>51</sup> As to the Army, see Marcus Cunliffe, *Soldiers and Civilians: The Martial Spirit in America, 1775-1865* (Boston, Little Brown & Co., 1968) and Don Rickey Jr., *Forty Miles a Day on Beans and Hay*, (Norman, Okla.: University of Oklahoma Press, 1963). As to the Navy, Valle, *Rocks and Shoals*, note 22 supra and Frederick S. Harrod, *Manning the New Navy: The Development of a Modern Naval Enlisted Force, 1899-1940* (Westport, Conn. Greenwood Press, 1978). See also Williard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States*, (Madison: University of Wisconsin Press, 1956) 31-32.

<sup>52</sup> The author of a comprehensive study of Civil War military justice concluded: "In reading through numerous regimental accounts, it becomes quite evident that the execution of deserters was performed to set examples for the rest of the troops - and for imprisoned deserters and bounty jumpers - rather than as punishment for the crime committed." Robert I. Alotta, *Civil War Justice, Union Army Executions under Lincoln* (Shippensburg, Penna.: White Mane Publishing Co., Inc. 1989) 17.



1920<sup>53</sup> and then comprehensively in the 1950 Uniform Code of Military Justice and its subsequent amendments.<sup>54</sup>

For the first time, a semi-official text articulated the goals of nonjudicial punishment [NJP] under the Uniform Code:

Resort to NJP is proper for all minor offenses when nonpunitive measures are considered inadequate or inappropriate. If it is clear that NJP cannot meet the needs of justice and that more stringent measures must be taken, a court-martial may be warranted. NJP can be used to meet the following objectives:

1. To correct, educate, and reform offenders who have shown that they cannot benefit by less stringent measures;
2. To preserve, in appropriate cases, an offender's record from the stigma that a court-martial would entail;
3. To promote military efficiency by disposing of minor offenses in a manner requiring less time and manpower than would trial by court-martial.<sup>55</sup>

With regard to the newly articulated goal of rehabilitation, Robert E. Quinn, former Chief Judge of the U.S. Court of Military Appeals said in 1972:

While the volume of serious crime is ever-increasing, the great bulk of offenses dealt with in the criminal justice system, civilian and military, are of a routine and minor nature, such as disorders of various kinds. The civilian prosecutor who believes that some kind of punishment is essential for rehabilitation of the accused has no choice but to submit the offense to trial. A significantly different choice is open to the military commander. He can resort to a form of disciplinary punishment as a substitute for the criminal proceedings of courts-martial.<sup>56</sup>

"Rehabilitation" usually suggests restoration to a prior capacity. Any individual receiving nonjudicial punishment remains a member of the armed forces. He (or she) may or may not be "restored" to the capacity of being a satisfactory soldier, sailor,

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<sup>53</sup> John M. Lindley, *A Soldier is Also a Citizen: The Controversy over Military Justice, 1917-1920* (New York: Garland Publishing, Inc. 1990).

<sup>54</sup> Generous, *Swords and Scales*, note 25 supra.

<sup>55</sup> Byrne, *Military Law*, note 16 supra 195.

<sup>56</sup> Quinn, "Prosecutorial Discretion: An Overview of Civilian and Military Characteristics," 10 *San Diego L. Rev.* 36, 49 (1973).

or airman. The U.S. system assumes that the enlisted person (or officer, see below) will, as a result of the punishment, strive to rehabilitate himself. A provision in the 1962 amendments permitting correctional custody, defined as "the physical restraint ... during duty or non-duty hours and may include extra duties, fatigue duties or hard labor"<sup>57</sup> envisioned a specially trained staff for their rehabilitation facilities.<sup>58</sup> I do not think that correctional custody has been used as it was designed and the Ranger incident in 1980, in which a sailor died while undergoing "rehabilitation" in correctional custody raised grave doubts about the quality of staff training.<sup>59</sup> Provisions which allow for the suspension of demotion or of forfeiture of pay are more widely used and are based on the assumptions that the offender will "shape up" in order to avoid execution of the punishment and that once "shaped up," he will stay that way. If he does not, administrative discharge action will be initiated.<sup>60</sup>

In my judgement, rehabilitation plays a very minor role when officers receive nonjudicial punishment. Competition among officers with "clean" selection records means that the stigma of an Article 15 effectively bars the officer from favorable consideration for promotion and, possibly, retention. Typically, an officer is offered an Article 15 when, in the commander's judgement, a court-martial would give a sentence in the same range as that available for nonjudicial punishment. In an officer context, punishment is imposed neither to deter nor to rehabilitate but to express formal disapproval of the officer's act.<sup>61</sup>

#### B. The Need to "Punish on the Spot."

Professors Berman and Grenier draw a helpful distinction:

If we consider the various kinds of threats to social order, and various kinds of way in which threats are met in a given

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<sup>57</sup> Art. 15(b), 10 U.S.C. 815 (b).

<sup>58</sup> S. Rep. No. 1911, 87th Cong., 2d Sess. 6, reprinted in 1962 U.S. Code Cong. & AD. News 2380, 2364. See also, Generous, *Swords and Scales*, note 25 supra at 140, 149.

<sup>59</sup> The incident is described in Note, "Nonjudicial Punishment under Article 15 of the Uniform Code of Military Justice: Congressional Precept and Military Practice," 19 San Diego L.Rev. 839, 868-873 (1982).

<sup>60</sup> See note 42 supra.

<sup>61</sup> See, e.g. *Cochran v. United States*, 5 Ct.Cl. 3 (1983) where a major general was offered and accepted nonjudicial punishment for misuse of government property.

society, we can distinguish between kinds of disorder (or potential disorder) which call forth relatively spontaneous, speedy and unformulated social responses on the one hand, and kinds of disorder which call forth relatively deliberate, time-consuming, and articulately defined social responses. Moreover, the latter kind of response tends to be public and objective, while the latter tends to be more intimate and more personal.... [Breaches of etiquette, or other informal norms of behavior are responded to informally.] These kinds of activity are part of the folkways (patterns of social behavior) and mores (norms of social behavior) of a given society, which include habit, convention, public opinion, tradition, and other informal social controls. If, on the other hand, a legal solution is sought to the problems that arise from ... disruptions of the patterns or norms of social behavior, then time must be taken for deliberate action, for articulate definition of the issues, for a decision which is subject to public scrutiny and which is objective in the sense that it reflects an explicit community judgment and not merely an explicit personal judgment. These qualities of legal activity may be summed up in the word formality ..."<sup>62</sup>

The U.S. system of nonjudicial punishment is characterized by formality in that sense. A commander may no longer say "Jones, you were drunk" and impose punishment without giving the accused a chance to speak<sup>63</sup> but other characteristics of a mature legal system - an impartial tribunal, elaborate rules of procedure, the right to legally qualified counsel, and stylized grounds for appeal to a superior tribunal - are either absent, or minimized. The U.S. experience suggests that it would be impossible to impose a judicial framework on all those cases presently handled by nonjudicial punishment. 1991 statistics indicate the size of the caseload.<sup>64</sup>

service:	ARMY	NAVY/MARINES	AIR FORCE	COAST GUARD
courts-				
martial:				
- general:	1173	797	631	9
- special:	679	4357	468	34
- summary:	931	2420	15	18
non-judicial				
punishments:	60,269	41,660	10,683	1169
Serving Judge				
-Advocates:	1610	900 (approx.)	1399	162

<sup>62</sup> H.J. Berman and W.R. Grenier, *The Nature and Functions of Law*, 4th ed. (Mineola N.Y.: The Foundation Press, 1980) 26.

<sup>63</sup> Valle, Rocks and Shoals note 22 supra.

<sup>64</sup> Drawn from COMA report, note 44 supra.



Requiring, for example, that a judge advocate serve as the "impartial tribunal" in lieu of the commander, or that all minor offenses be referred to a court-martial, would either require an enormous increase in the number of judge advocates and law clerks at a time when Congressionally mandated manpower ceilings are forcing severe curtailment of the combat arms, or require the ever decreasing number of officers to spend much of their time as court members. Commanders might well return to the Nineteenth Century practice of imposing extra-legal punishments.<sup>65</sup>

Although I have strong personal opinions, based on reading and experience, regarding the notion that someone other than a commander is as competent to punish "those little crimes and disorders incident to soldiery" the objective ratio of minor offenses to courts-martial dictates no change in the system. Fortunately, the Supreme Court's ruling in *Middendorf v. Henry*<sup>66</sup> bars any radical judicial change. In that regard, you may be unaware of the fact that the Supreme Court's controversial *O'Callahan* decision<sup>67</sup> which required that an offense be "service connected," before a court-martial gained jurisdiction, was never applied to nonjudicial punishments.<sup>68</sup> In the final section of this paper, my responses to your questions will suggest why nonjudicial punishment was granted this dispensation from *O'Callahan's* strictures.

#### RESPONSES TO THE SUMMARY TRIAL WORKING GROUP

##### A. What is the purpose of a separate military justice system?

My response is based on the reasons offered by the late Professor William W. Bishop Jr. of Yale Law School<sup>69</sup> who wrote twenty years ago:

1. Military discipline cannot be maintained by the civilian criminal process, which is neither swift nor certain.... An army without discipline is in fact more dangerous to the civil population (including that of its own country) than to the

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<sup>65</sup> Notes 10 to 16 supra and accompanying text.

<sup>66</sup> Note 45 supra.

<sup>67</sup> *O'Callahan v. Parker*, 395 U.S. 258 (1969), overruled by *Solorio v. United States*, 483 U.S. 435 (1987).

<sup>68</sup> *United States v. Sharkey*, 19 USCMA 26, 41 CMR 29 (1969); *Gallagher v. United States*, 191 Ct.Cl. 546, 423 F.2d 1371, cert. denied, 400 U.S. 849 (1970).

<sup>69</sup> *Justice Under Fire* (New York: Charterhouse, 1974).



enemy. The public interest in discipline is therefore entitled to greater weight, and the rights of the accused to lesser weight, in the military than in the civilian context.<sup>70</sup> "[The demands of military discipline] justify a procedure that does lessen the chance of unjust acquittal, while it need not, and should not, increase the possibility of unjust conviction. In civilian jurisprudence the number of guilty men who are not punished is far, far greater than the number of innocent men who are, and few of us would have it otherwise. But the doctrine that it is better that ninety-nine (or nine hundred and ninety-nine) guilty men go free than that one innocent be convicted is not easily squared with the need to maintain efficiency, obedience and order in an army, which is an aggregation of men (mostly in the most criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons. Moreover, there are some types of conduct - desertion and insubordination for example - which are not crimes at all in civilian life but whose deterrence is essential to the very existence of an army."<sup>71</sup>

2. Another aspect of the discipline argument: Since discipline is a responsibility of the military commander, he should have some control of the machinery by which it is enforced - to decide, for instance, whether a particular offender should be prosecuted and what degree of clemency will best promote the efficiency of his command.

3. Military offenses - absence without leave, desertion, insubordination, cowardice, mutiny and the like - have no civilian analogues: The adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors.

4. Soldiers may be stationed and commit crimes in places outside the jurisdiction of ... civilian courts."<sup>72</sup>

I understand that the problem of extraterritoriality has caused some problems for peacekeeping contingents whose national military codes assume that "civilian" crimes of, for example, theft or rape would be tried in domestic courts.<sup>73</sup>

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<sup>70</sup> Ibid. 21.

<sup>71</sup> Ibid. 23-24.

<sup>72</sup> Ibid. 24. Footnotes omitted.

<sup>73</sup> Noone, Intervention [on peace keeping], XXVIII Revue de Droit Militaire et de Droit de la Guerre 495, 497 (1989).

Bishop's reasons are, in my judgement, so powerful that there is little I can add to them except to note that civilian prosecutors rarely have the resources, or courts the time, to utilize the punitive goal of expressing societal disapprobation of the accused's behavior. For example, "minor" sexual assault cases involving attempted touching are never, in the absence of some aggravating factor, brought to trial in civilian life because a first-time offender would not receive any palpable punishment. Such incidents are routinely punished in the military (if there is proof of the accused's guilt) in order to deter others but primarily to remind the military and civilian communities that members of the armed forces - particularly officers and noncommissioned officers - are held to the highest standards of behavior. This could be expressed as another reason for a separate military justice system:

5. Because society has granted the military extraordinary privileges - including a near monopoly on the use of deadly force, and the right to expose their sons and daughters to death, mutilation or captivity - minor criminal offenses must be punished in order to justify the institution's claim to those privileges. The U.S. Supreme Court's oft-expressed deference to military judgements, no matter how questionable they may be by civilian standards<sup>74</sup> is based on a recognition of the unique characteristics of the military justice system and the implications of what General Sir John Hackett has called the "unwritten clause of unlimited liability under which the man-at-arms engages to serve."<sup>75</sup> Police and fire personnel similarly agree to expose themselves to mortal danger but society imposes no particular criminal penalties for violations of their institution's norms. A separate (and different) military justice system reflects society's view that the armed forces are fundamentally different.

B. Is it necessary to have the same system in peace and war?

There is a purely practical reason for saying that any distinction based on those two terms is legally useless. Congress, given the power by the Constitution to declare war, never did so during the Korean and Vietnamese hostilities but the Court of Military Appeals was subsequently forced to decide whether certain provisions of the UCMJ which were only effective "in time of war" had been activated.<sup>76</sup> Even when Congress has declared war,

<sup>74</sup> See, e.g. *Goldman v. Weinberger*, 475 U.S. 503 (1986)

<sup>75</sup> *The Profession of Arms* (London: Sedgwick & Jackson, 1984) 184.

<sup>76</sup> *United States v. Anderson*, 17 USCMA 588, 38 CMR 386 (1968); *United States v. Bancroft*, 3 USCMA 3, 11 CMR 3 (1953); See also (continued...)

problems arise as to the date of inception<sup>77</sup> and the date of termination.<sup>78</sup> While it may be appropriate to, for example, permit enhanced punishment for certain offenses committed when the accused was in a "hostile fire" zone (previously designated by appropriate authority), fundamental changes in the system would lead to legitimate complaints of unfairness. Any effort to impose such a distinction would raise particular problems for a country like Canada whose peacekeeping troops are routinely exposed to hostile fire although they are not at war.

C. What is the importance and role of the summary trial within the military justice system?

If you will accept the U.S. definition of summary trial as nonjudicial punishment,<sup>79</sup> then its relative importance in the U.S. system is indicated by statistics<sup>80</sup> which establish that nearly all offenses are handled summarily, although the accused could have rejected punishment and requested trial by court-martial. As a consequence of this "safety valve," the two most trenchant attacks on the U.S. military justice system<sup>81</sup> contain no substantive criticism of nonjudicial punishment.

Although I was unable to survey all developed nations' military criminal codes, the literature suggests that most have some equivalent of the summary trial system.<sup>82</sup> It is noteworthy that the post-war drafters of the German *Grundgesetz*, "reacting," in Professor Bishop's words, "against a monstrous overdose of

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<sup>76</sup>(...continued)

Hamilton v. Mclauhen, 136 F. 445 (CCD Kans. 1905) (Boxer Rebellion).

<sup>77</sup> The Protector, 70 U.S. (12 Wall.) 700 (1872).

<sup>78</sup> See e.g. Eisner v. United States, 127 Ct. Cl. 323, 117 F.Supp. 197 (1954) and Anglo Chinese Shipping Company Ltd. v. United States, 130 Ct.Cl. 161, 127 F.Supp. 533, cert. denied, 349 U.S. 938 (1955).

<sup>79</sup> Note 2 supra.

<sup>80</sup> Text accompanying note 64 supra.

<sup>81</sup> Luther C. West, *They Call it Justice* (New York: Viking Press, 1977), Robert Sherrill, *Military Justice is to Justice as Military Music is to Music* (New York: Harper & Row, 1969).

<sup>82</sup> Rheinstein, "Comparative Military Justice," 15 Federal Bar Association Journal 276 (1965); various National Surveys in the *Military Law Review*.



militarism, at a time when Germany had no armed forces and no spokesmen for the military point of view"<sup>83</sup> severely restricted the jurisdiction of courts-martial but left the punishment of petty offenses in the hands of the military.<sup>84</sup> The fact that the Nineteenth century U.S. Army was compelled to initiate such a system without Congressional approval is perhaps the best evidence of its importance.

D. What is the purpose of the summary trial in respect of maintaining discipline?

I will attempt to answer your question by commenting on the term "discipline." Traditionally, the term was synonymous with "obedience,"<sup>85</sup> which emphasized the vertical relationship between superior and subordinate. The summary punishment of minor offenders was, and to a large extent still is, intended to maintain that relationship by deterring deviations from the norm. Deviations which, in Washington's words, "from the multiplicity of them, if referred to Courts-Martials, would create endless trouble." Many of these deviations seem, to someone unfamiliar with the military, so trivial that they should be disregarded. Perhaps the best response is found in the reminiscences of a U.S. Marine enlisted man who fought in two of the bloodiest battles of the Second World War:

Our level of training rose in August and so did the intensity of "chicken" discipline. We suffered through an increasing number of weapons and equipment inspections, work parties, and petty clean-up details around the camp. The step-up in harassment, coupled with the constant discomforts and harsh living conditions of Pavuvu, drove us all into a state of intense exasperation and disgust with our existence before we embarked for Peleliu. ....

I griped as loudly as anyone about our living conditions and discipline. In retrospect, however, I doubt seriously whether

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<sup>83</sup> Justice Under Fire, note 69 supra, 20.

<sup>84</sup> Moritz, "The Administration of Justice within the Armed Forces of the German Federal Republic," 45 Military Law Review 1, (1960); Krueger-Sprengel, "The German Military Legal System," 57 Ibid. 17 (1972); Sherman, "Military Justice Without Military Control," 82 Yale L.J. 1398, 1408-1413 (1973).

<sup>85</sup> "An army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open to the right to command in the officer or the duty of obedience in the soldier." In re Grimley, 137 U.S. 147, 153 (1890) (rejecting challenge to court-martial jurisdiction by illegally enlisted soldier).



I could have coped with the psychological and physical shock and stress encountered on Peleliu and Okinawa had it been otherwise. The Japanese fought to win. It was a savage, brutal, inhumane, exhausting and dirty business. Our commanders knew that if we were to win and survive, we must be trained realistically for it whether we liked it or not.\*

\*In the postwar years, the Marine Corps came in for a great deal of undeserved criticism, in my opinion, from well-meaning persons who did not comprehend the magnitude of stress and horror that combat can be. The technology that developed the rifled barrel, the machine gun, and high-explosive shells has turned war into prolonged, subhuman slaughter. Men must be trained realistically if they are to survive it without breaking mentally and physically.<sup>86</sup>

Prompt punishment for minor offenses not only reinforces the vertical relationship between superior and subordinate, it also performs other functions. By inducing a habit of obedience it sustains the horizontal relationship between members of the force, particularly those within the same unit. Not only does the superior know that he can trust his subordinates to obey; subordinates know that their fellows can be trusted to obey. I understand that someone else is addressing the issue of unit cohesion, which first became the object of scholarly attention after World War II and which I have written on elsewhere<sup>87</sup> but I would be remiss if I did not refer to it as well. The vertical and horizontal relationships which I have described rely in large part on the deterrent and rehabilitative goals of punishment. It must be emphasized that summary punishment also gives the accused the opportunity, without the stigma of a court-martial conviction, to rehabilitate himself. If he succeeds, his confidence in his own self-worth is enhanced, and he becomes a better soldier.

Two other aspects of the summary punishment process merit comment. Commanders are called on to act judicially: to decide whether an offense has occurred, by for example interviewing witnesses and establishing facts; to decide whether non-punitive measures (counselling, admonition, extra military instruction) is the appropriate response; and, if summary punishment (in lieu of reference to a court-martial) is warranted, to decide what sanctions should be imposed. This process tests and trains the commander in qualities of judgement and humanity which are invaluable attributes of leadership. Automatic review of the

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<sup>86</sup> E.B. Sledge, *With The Old Breed at Peleliu and Okinawa* (New York: Oxford University Press (1981), 40-41. I am indebted to Benis Frank, senior Marine Corps historian, and veteran of both battles, for bringing this book to my attention.

<sup>87</sup> Noone, "Military Social Science Research and the Law," 15 *Armed Forces and Society* 193 (1989).

action, and provisions for appeal, insure that the accused will not suffer from arbitrary or autocratic exercise of the power. Thus, summary punishment enhances leadership skills. Finally, summary punishment, justly exercised, gains the respect of the commander's subordinates. If they know that he can be trusted to act fairly in (relatively) small matters, they will be prone to trust him in large ones.<sup>88</sup>

E. Why is the commanding officer, and other officers within the chain of command (delegated officer, superior commander) responsible for the summary trial, and should those officers have that responsibility? Is it necessary?

I've made it clear that my experience and reading lead me to conclude that summary punishment is a necessary function of command. The Canadian practice of appointing a delegated officer to make findings and impose punishment is foreign to my concept of nonjudicial punishment, although the practice resembles the U.S. summary court-martial. The U.S. Supreme Court concluded in *Middendorf v. Henry*<sup>89</sup> that a summary court-martial was not "a criminal prosecution" which, according to the U.S. Constitution, would require that the accused be granted the right to counsel. The Supreme Court's conclusion was justified in part by the fact that Article 20 of the Uniform Code of Military Justice provided that "(N)o person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto ...<sup>90</sup> and that Article 38 (b) provided that "the accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under section 827 of this title."<sup>91</sup>

F. and G. I defer to the author of the other paper on cohesion and morale.

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<sup>88</sup> Sledge, note 86 supra, speaks of his first combat commander (who was later to be killed in battle) as follows: "Although he insisted on strict discipline, the captain was a quiet man who gave orders without shouting. He had a rare combination of intelligence, courage, self-confidence, and compassion that commanded our respect and admiration. We were thankful that Ack-Ack was our skipper, felt more secure in it, and felt sorry for other companies not so fortunate." Ibid.40.

<sup>89</sup> Note 45 supra.

<sup>90</sup> 10 U.S.C. 820.

<sup>91</sup> 10 U.S.C. 838(b).

H. What is the purpose/importance of the speed, informality and visibility of the process?

As to the speediness of the process: it is a truism that "justice delayed is justice denied." Justice in this context refers not only to the accused's right to have his case heard promptly but the community's right to have the matter resolved. This is particularly true in those cases involving minor breaches of discipline by an officer or senior noncommissioned officer in which any appreciable delay suggests to the military community that a double standard is being applied. As to its "informality": it meets Professor Berman and Grenier's standards of formality<sup>92</sup> which ensure that the accused and the community sense that justice is being done. The process in the U.S. system was not originally intended to be public although the Department of Defense Directive<sup>93</sup> gives the accused the right to make it so. The degree of publicity attendant on nonjudicial punishment in the US system is totally within the control of the accused, since it is not a public trial within the meaning of the Constitution and as a personnel matter falls within the strictures of our Freedom of Information and Privacy Acts. Thus, all three characteristics of the system you list are, in the U.S. system, within the control of the accused: he can delay it, or make it more formal, or more public by requesting trial by court-martial or waiving his privacy rights.

I. What is the importance/ effectiveness of the different types of punishments in maintaining discipline?

Nonjudicial punishment was historically directed toward low ranking enlisted personnel and was intended first to deter, and more recently to rehabilitate. More than 50% of the young enlisted force in the U.S. military are now, I understand, married. Commanders must now consider the effect of punishment on the soldier's family and therefore a broad spectrum of sanctions must be available in order to avoid undue hardship on the innocent family members. I have no data which would indicate the relative importance/ effectiveness of different types can punishment. I have the impression that correctional custody has not been used as often as its sponsors thought it would be used.

This concludes my report. If you believe it has not been responsive to your request, please let me know so that I can amend it. Thank you for giving me the opportunity to work with the Canadian Forces.

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<sup>92</sup> Note 62 supra and accompanying text.

<sup>93</sup> Note 46 supra.