

waiting was often lengthy. Travelling counsels had no special priority.

Traffic between 1st MAW and the 1st Marine Division on Hill 327, or going to the III MAF brig, had to pass through "Dogpatch," a center of marijuana sales and prostitution.<sup>64</sup> Danger could be found there, as well. A hand grenade was tossed into a jeep in which Lieutenant Colonel Daniel F. McConnell, the 3d Marine Division's deputy SLO, was riding. Luckily, the grenade was a dud.<sup>65</sup> Captain Mark L. Haiman, a 3d Marine Division lawyer, when asked about transportation difficulties, replied, "no air, no trucks, no roads, no shit."<sup>66</sup>

### *Trying Cases*

Securing witnesses for trial in the combat zone never became routine. Obtaining them often depended on the tenacity of the individual lawyer. The 3d Marine Division's SLO said: "I recall Major [Robert J.] Chadwick . . . going with a patrol on the day before he was scheduled to leave Vietnam, to locate some Vietnamese witnesses. The patrol was involved in a fire-fight, but Major Chadwick got his witnesses—and without them, there could have been no trial."<sup>67</sup>

Finding the witnesses, Vietnamese and American, could be only the beginning. Captain Higginbotham recalled:

Vietnamese witnesses were particularly difficult, since they seldom had any concept of dates or time . . . and could not understand why they were not allowed to testify as to what they had been told by others within their village . . . . On one occasion . . . before the matter [a rape charge] could go to trial, one of the defendants was killed in combat and the other was medically evacuated from RVN with a broken leg . . . . On still another occasion . . . I discovered, just as I was about to conclude my opening argument, that my witness had been sent home two days prior to trial, forcing me to grudgingly join with the defense in a motion to dismiss the charges.<sup>68</sup>

Vietnamese witnesses, most of whom did not own watches, described time in terms of cigarettes; they testified that an event took two cigarettes, or half a cigarette, to transpire.<sup>69</sup> Marine lawyers also found that

\*On 2 March 1976, Robert J. Chadwick was promoted to the grade of brigadier general and four months later became the sixth director of the Judge Advocate Division. Commissioned a second lieutenant in June 1951, he was an infantry platoon commander in combat in Korea and, later, a reconnaissance platoon commander. After serving at the American Embassy in Paris, France, he earned a law degree and master of laws degree, eventually becoming SJA of several major commands, an appellate judge on the Navy Court of Military Review, and an Assistant Judge Advocate General of the Navy. (RefSec, MCHC).

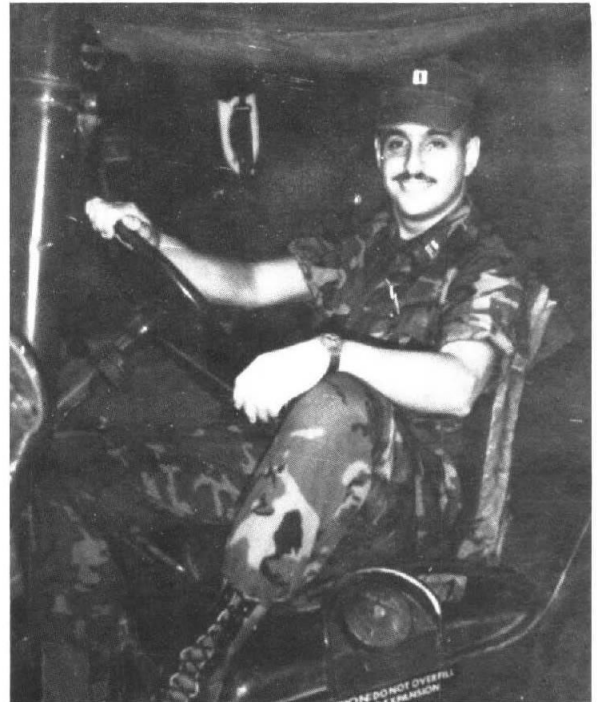


Photo courtesy of Col Mark L. Haiman, USMC  
*Ground transportation was as difficult to secure as air transportation. Capt Mark L. Haiman, 3d Marine Division lawyer, sits behind the wheel of a Mighty Mite.*

the Vietnamese seldom referred to their villages by the same names shown on American maps, which made direct and cross-examination confusing. Equally troublesome, Vietnamese witnesses often were unable to identify an accused because, as one record of trial read, "all Marines look alike to them."<sup>70</sup>

Sometimes it was not possible to examine a crime scene, or to go to a village in search of witnesses, because the place in question was in an unsecured area. The attorney could, however, request to accompany a Marine patrol to the desired location, or request that a patrol be designated to escort him to that location.

Captain James L. Williams commanded Company H, 2d Battalion, 4th Marines, in late 1967. He was assigned to take a party of Marine lawyers and witnesses, participants in an Article 32 investigation, to a village in contested territory. The charges involved the murder of Vietnamese. At first light Captain Williams led his entire company, with legal party, from Quang Tri. With one platoon forward, two back, and lawyers in the middle they proceeded about 10 kilometers through "Indian country" to the village. Upon arrival the area was cordoned off and the lawyers and witnesses entered to conduct their business. For several hours the infantry company remained immobile, and



Photo courtesy of Col Donald Higginbotham, USMCR

*Maj Winn M. Thurman presides at an investigation in the NCO club of the 2d Battalion, 1st Marines, in July 1967. The reporter, Cpl Michael J. Partyka, uses the closed microphone system to record the testimony of the Vietnamese witness, as repeated by the translator. Other participants are Capts Ross T. Roberts and Eugene A. Steffen, at left.*

*On Thanksgiving Day 1967, near Quang Tri, Capt Ross T. Roberts uses a EE-8 telephone to search for witnesses. In the background, Capt Donald E. Wittig heats C-rations.*

Photo courtesy of Col Donald Higginbotham, USMCR





Photo courtesy of Mr. Victor J. Haydel

*A lineup, with counsel present. From left, Capts Victor J. Haydel, Harvey J. Gleason, and Robert W. Wachsmuth; 1stLt Jerry G. Cunningham; Capts H. Edward Moore, Jr. and Dennis H. Siems, Force Logistic Command lawyers, at their Camp Books office.*

subject to periodic sniper fire. No casualties resulted. Finally, mission accomplished, Captain Williams led his company and attached court personnel back to Quang Tri, arriving as darkness fell.<sup>71</sup>

Technology continued to bedevil courts-martial in Vietnam. By 1967 both the 1st and 3d Marine Division's SLOs countered electrical power losses with portable generators.<sup>72</sup> Recording machines remained inadequate to their tasks. Colonel "Doc" Fallon angrily pointed out that, on the average, three of his ten Grey Keynoters were in repair each week, and at one point, eight of 10 were under repair by FLC (whose personnel were not trained to repair Grey equipment) and it took up to six months to complete the work. He recommended they be written off and replaced with equipment manufactured by IBM, which was said to have in-country repair facilities.<sup>73</sup> Even when the machines were functioning, the heat of Vietnam could melt recording machine discs.<sup>74</sup> Perspiration fell on records of trial as they were reviewed, sometimes making them illegible.<sup>75</sup> "The systems," Captain Mitchell pointed out, "were put together with patchwork cables. You could find yourself in a situation where you had a combination of machines and cables which

wouldn't allow you to use anything, even though you had two or three machines up."<sup>76</sup>

A solution, of sorts, to the inability to repair the Grey Keynoters and Audiographs was eventually found. If repairs were not available in Vietnam, take the machines where repair facilities were available: Okinawa or Japan. Sending a Marine, often an enlisted legal clerk or reporter, to Japan to wait several days while repairs were made had the added advantage of effectively gaining an R & R quota. As Major Michael Patrick Murray viewed it, that was "just a little bit of the usual Marine ingenuity."<sup>77</sup>

The Uniform Code of Military Justice specifically allowed an accused to be represented by a civilian lawyer in the court-martial process, and a surprising number of civilians made appearances in the combat zone on behalf of accused Marines.<sup>78</sup> Although fee arrangements were between lawyer and client, most often fees and expenses were paid by the accused or his family who frequently were distrustful of the quality of military representation. Often the civilian attorney appeared *pro bono*—that is, without fee, sometimes even paying his own expenses, such as transportation. Civilian lawyers ate in unit messhalls, used officers'



Photo courtesy of LtCol William B. Draper, Jr., USMC (Ret.)

*Court is adjourned. 1st Marine Division lawyers relax at Chu Lai in October 1966, shortly before moving to Hill 327. From left, Lt Walter J. Landon, USN, back to camera; unidentified; 1stLt Michael J. Naughton; Capt Francis T. Coleman; and Capt Daniel M. Hanlon.*

and enlisted men's clubs, and were billeted in officers' quarters. Lieutenant Colonel William T. Westmoreland, Jr., former SLO of the 1st Marine Division, noted that "everything—the head, the messhall, the showers, the courtroom—was either up or down hill. And it was raining and it was slippery. I felt we were very lucky not to have any civilian heart attacks or broken legs."<sup>79</sup>

Civilian representation at courts-martial can be a two-edged sword. The civilian usually brought a degree of experience and practiced skills outweighing those of the Marine trial counsel. On the other hand, they sometimes were unable to develop the rapport with Marine Corps members that was important to courtroom persuasion. They seldom knew how to deal effectively with a convening authority when seeking withdrawal or downgrading of charges or bargaining for a pretrial agreement. They did not know how to locate military witnesses or secure their presence, once located.

The accused's assigned military defense counsel normally continues in that capacity, even if a civilian law-

yer is retained. The civilian lawyer usually enlists his military counterpart to carry out those functions relating to the military aspects of the trial, such as dealing with the convening authority, securing witnesses, and marshalling evidence of a military nature. Among military defense counsels so employed there sometimes is a feeling that they have done the most onerous preparation for trial, while the civilian is paid as if he alone had prepared and tried the case. But for the most part, a mutual respect existed between civilian and military lawyers in Vietnam.

On 18 January 1967, two West Virginians hired by an accused's family were among the first civilian lawyers to arrive in Vietnam, escorted by Lieutenant Colonel Frederick M. Haden.\* Twelve days earlier Private First Class Charles W. Keenan, a sophomore at Wake Forest University before joining the Marine Corps, had been convicted of two specifications (counts) of murder and had been sentenced to hard

\*Early in the war civilian lawyers were escorted from Hawaii to Vietnam by a Marine lawyer from FMFPac's legal office. That proved unnecessary and was soon discontinued.

labor for life, loss of all pay and allowances, reduction to private, and a dishonorable discharge.<sup>80</sup> His two civilian lawyers now wanted to review the record of trial, visit their client in the III MAF brig, and form their own opinion as to the fairness of the conviction. "They showed up quite aggressive; you might even say hostile," Lieutenant Colonel Westmoreland remembered.<sup>81</sup> The records were reviewed, the client visited, and the military defense counsel interviewed. As the SLO, Lieutenant Colonel Casey, recalled:

They requested to see the scene of the incident. The request was granted, so an armed [patrol] was obtained, the attorneys were outfitted in . . . helmets, flak jackets, etc., and were asked to sign a waiver of liability in the event of death or injury, and had it explained to them that we did not have this area under control. At this point they reached the conclusion that a view of the scene was not necessary.<sup>82</sup>

In a message to the Commandant, General Walt wrote that "[the two lawyers] stated they would not want to risk having a Marine hurt on such a mission, and that official photographs taken at the scene . . . would serve their needs."<sup>83</sup>

Before they returned to West Virginia, the civilian lawyers were interviewed by an Associated Press reporter, Mr. Robert Ohman. They told him they had been shown everything they had asked to see, were "very satisfied" with the military defense counsel, Major Curtis W. Olson, and, demonstrating their basic ignorance of the military legal system, noted that they were surprised to learn Major Olson was a lawyer. Their client, they acknowledged, "got as fair a trial as he would have gotten in any civilian court."<sup>84</sup>

The Keenan case also generated correspondence illustrating the regard for military law held by at least one elected official. A West Virginia member of the U.S. House of Representatives, in a nine-page letter to the Secretary of Defense, protested the conviction of Keenan, his constituent, and berated the military justice system:

Throughout the court-martial . . . there was always an underlying but unprovable suspicion that he was being prosecuted primarily at the urging of persons . . . who wished to curry favor . . . in the Saigon Government . . . . It was completely impossible to explain to anyone how a Marine

*The government rests. In February 1967 LtCol John L. Zorack, right, officer-in-charge of the Task Force X-Ray legal office at Chu Lai, celebrates the conclusion of nine courts-martial, all involving charges of murdering noncombatants. One of those charged was PFC Charles W. Keenan. LtCol Zorack hosted a dinner, complete with wine, for defense and prosecution lawyers, including several sent from Da Nang to augment his staff for the nine cases. From left: Capt James P. Shannon; 1stLt Daniel M. Hanlon; unidentified partially hidden officer; Maj Curtis W. Olson; and Capt Francis T. Coleman.*

Photo courtesy of LtCol John L. Zorack, USMC (Ret.)



could be charged with premeditated murder while on patrol and following orders . . . . That preposterous charge . . . . The monstrous damage which has been done to him almost defies a suggestion of proper restitution.<sup>85</sup>

The House member detailed his dissatisfaction with Keenan's conviction of murder by firing automatic rifle fire at point-blank range into an unarmed, elderly Vietnamese woman, and an unarmed Vietnamese man.\* Then he suggested how amends might be made to Keenan:

Only one course of action is possible . . . . I do request and require that you take action . . . to restore and make whole the life, career and reputation of P.F.C. Keenan immediately. Specifically, the following actions seem appropriate as a bare minimum:

5. A letter to P.F.C. Keenan from the Commandant of the Marine Corps complimenting him on his courage and his willingness to maintain the faith and the discipline of the Corps . . . . This letter should be widely publicized.

6. An official statement by the Department admitting that an error was committed and summarizing the actions being taken to restore and make whole the name and reputation of P.F.C. Keenan.

There is no specific total dollar value which can be placed upon a man's good name. I must therefore reserve the right to consider alternative or supplementary courses of action. I would regret exceedingly the necessity to place this matter formally before a Congressional Committee . . . . I have seldom written an official of Cabinet level and then released the contents of my letter to the press prior to the time that I received his response. I believe it is an undignified procedure and I deplore the practice. In this case, however. . . .<sup>86</sup>

Secretary of Defense Clark M. Clifford, in a brief reply to the representative, noted that the case was still under review and that "it would be inappropriate for me to intervene." He closed, "your continued interest in matters relating to our national security is appreciated."<sup>87</sup>

Another case involved civilian attorney Grant B. Cooper. In June 1967 he arrived in Da Nang to defend a Marine lance corporal charged with the murder of one elderly Vietnamese man and the assault of

another. Mr. Cooper was a prominent Los Angeles trial attorney, who had been defense counsel in a number of widely reported cases and was the author of several respected legal texts. He later defended Sirhan B. Sirhan, the murderer of Robert Kennedy.

The lance corporal represented by Mr. Cooper, according to the charges, had been riding in the canvas-covered bed of a Marine "six-by," a two-and-a-half-ton, multi-purpose cargo truck. He was intoxicated. As the truck passed through the village of An Khe, the lance corporal had indiscriminately fired several rounds from his M14 rifle. Allegedly, one of the rounds had gone through the truck's canvas covering, pierced the thatched wall of a dwelling, killed the victim, and continued on to wound the second victim in the shoulder. Several other Marines had been riding in the back of the truck, and there was evidence that more than one Marine had been firing his weapon.

At trial, in addition to Mr. Cooper, the lance corporal was defended by his assigned defense counsel, Captain Harry D. Sabine. Captain James P. Shannon was the prosecutor. Because of Mr. Cooper's presence, interest in the case was high, and several 1st Division lawyers observed the court-martial.

No defense motions were raised; both sides moved directly to the allegations. In two days the government called 14 witnesses, then rested. Mr. Cooper opened the defense of the lance corporal. He made no opening statement, but during the third day of trial, and part of a fourth, called nine defense witnesses and rested. The members had heard complex testimony from a ballistics expert, accident investigators, and a blood expert, as well as several conflicting accounts of the incident.

Normally, the trial counsel next makes an opening argument to the members, in which he summarizes the evidence, as viewed by the government, and argues the accused's guilt. The defense counsel then makes his closing argument, countering the government, and offers the defense view of the case. The trial counsel then makes a final argument, in which he may answer the defense's closing argument.

Major Bill Draper recalled the events of the trial:

[Jim Shannon] had presented a good case, including several incriminating admissions from the accused during cross-exam. His major concern was how to keep Cooper from destroying him with his years of experience in closing argument. Jim decided that the best course was to cause a role reversal by waiving [giving up] opening argument. Then he would be able to poke holes in Cooper's argument. It was a well-conceived plan and would have no doubt been successful, had Cooper been as gullible . . . as Jim thought. Shannon

\*After an initial mistrial, Keenan was convicted at a rehearing of the murder of the two Vietnamese. His resulting life sentence was reduced by the convening authority to 25 years confinement. Upon appellate review, the conviction of the woman's murder was dismissed, and Keenan's confinement was reduced to five years. Later clemency action further reduced his confinement to two years and nine months. A co-accused, Corporal Stanley J. Luczko, was also retried after his initial conviction for the two murders was set aside. The law officer at Luczko's Quantico, Virginia, rehearing was Colonel Jack E. Hanthorn, soon to be the SJA of the 1st Marine Division in Vietnam. Found guilty of voluntary manslaughter, Luczko was sentenced to a bad conduct discharge, forfeiture of all pay and allowances, reduction to private, and confinement for three years.



Photo courtesy of Col Donald Higginbotham, USMCR  
*"The overall philosophy [was] that we were Marine officers first and attorneys second." Capt Donald Higginbotham was awarded a Legion of Merit for a combination of his combat actions and legal work.*

waived opening and Cooper promptly followed suit. Thus a complex case was submitted to the members without benefit of argument.<sup>88</sup>

After 35 minutes of deliberation the members found the lance corporal not guilty of all charges.<sup>89</sup> In the officers' club that night, the Marine lawyers and other officers accepted Mr. Cooper's offer of a celebratory round of drinks for the house.<sup>90</sup>

#### *Marine Corps Lawyers in Combat: They Also Serve*

Unlike the other Armed Forces, in which judge advocates or law specialists received military training in only their specialty, the Marine Corps lawyer had attended The Basic School, where all newly commissioned Marines are taught the skills that lead to qualification as an unrestricted officer. Every Marine

was still a potential rifleman, every lieutenant and captain a potential platoon or company commander. With such training, several lawyers achieved recognition in Vietnam as Marine Corps small-unit leaders.

When he first arrived in the office of the 1st Marine Division's SLO in March 1967, Captain Donald Higginbotham was a defense counsel. He took every opportunity to be involved in combat operations. "The overall philosophy [was] that we were Marine officers first and attorneys second," he said. Practicing that belief, he once accompanied a four-tank reaction force sent to assist a heavily engaged platoon and for four days remained in combat. After that he was given command of a reaction company based near Hill 327.\* Captain Higginbotham conducted numerous cordon and search operations and molded his reaction company into an effective combat unit.

When the North Vietnamese Tet Offensive began on 30 January 1968, enemy sappers mortared and overran a ridgeline above the division's command post on Hill 327, killing seven Marines. As the enemy was about to reach the division command post, Captain Higginbotham deployed his men and led a counter-attack that threw back the enemy and secured a vital hill, where he established a defensive perimeter. His company continued in action through the next day with telling effect. For his actions, Captain Higginbotham received the Legion of Merit and the Vietnamese Cross of Gallantry.<sup>91</sup>

Second Lieutenant Michael I. Neil had just gained his law degree, when he came on active duty. Despite efforts to classify him as a Marine lawyer, Lieutenant Neil was adamant in his desire to be an infantry officer. (Although lawyers were permitted to request non-legal duties during their initial tours of active duty, at that time no lawyer lieutenant had done so.)<sup>92</sup> Lieutenant Neil prevailed, and in June 1967 he commanded the 1st Platoon, Company D, 1st Battalion, 7th Marines.

On the night of 20-21 December Lieutenant Neil, after having been on patrol for three days, was lead-

\*A reaction company was a unit, often composed of Marines from various headquarters sections, which "reacted" to enemy incursions. It was a demanding assignment, compared to the usual rear area duty, since it was in addition to one's normal duties. Reaction forces usually assembled at night, were subject to frequent false alarms, and were without benefit of significant training as a unit. Each evening, one third of the reaction force assembled, was issued weapons and ammunition, then slept, fully armed and clothed, in a central location within the compound. The next night the same third was off-duty; the next night the same third manned defensive positions on the perimeter; and so on.

ing his platoon in the area of Happy Valley, not far from Da Nang. Unexpectedly, they encountered a North Vietnamese infantry battalion. In the ensuing all-night battle Lieutenant Neil's platoon was surrounded and continuously engaged in fierce fighting and hand-to-hand combat. All of his squad leaders were either killed or wounded. At dawn a relief column finally reached Lieutenant Neil's position, and as the combat continued, a medevac helicopter managed to land briefly and evacuate the most seriously wounded.

One of Lieutenant Neil's squad leaders, Corporal Larry E. Smedley, was posthumously awarded the Medal of Honor for his part in the battle. Lieutenant Neil received the Navy Cross for his heroism that night. His citation reads, in part:

Disregarding the intense enemy fire, he led his men across 1,300 meters of thickly forested terrain . . . with complete disregard for his own safety, [he] exposed himself to the devastating fire to hurl hand grenades and direct his men's fire . . . . Shouting words of encouragement to his men, he boldly moved through the hail of enemy fire, leading an assault against the enemy positions . . . . Throwing hand grenades as he advanced, he destroyed a machine-gun emplacement and mortally wounded several enemy with his pistol.<sup>93</sup>

Two other platoon members were awarded Bronze Star Medals and the pilot of the medevac helicopter received the Silver Star Medal. The platoon, as a whole, was awarded a Meritorious Unit Commendation, the only infantry platoon in the Vietnam war to be so honored.\*

Later, Lieutenant Neil became an air observer and eventually left Vietnam with the Navy Cross, Purple Heart, and six Air Medals. He then became a defense counsel at the Marine Corps Recruit Depot, San Diego.<sup>94</sup> Lieutenant Neil's combat record remains unique among Marine Corps lawyers.\*\*

*The First Lawyer General Officer:  
No Immediate Change*

In World War II James F. Lawrence, Jr., commanded an infantry platoon and then a company on Guadalcanal and New Britain, and received the Bronze

\*Only three other platoon-sized units in Vietnam received the MUC: a combined action platoon, an explosive ordnance disposal platoon, and a graves registration platoon. (RefSec, MCHC).

\*\*After completing his obligated service, Neil continued to serve in reserve units—as an infantry officer and tracked vehicle officer. In 1988 he was selected for advancement to the grade of brigadier general in the Marine Corps Reserves.



Photo courtesy of BGen Michael I. Neil, USMCR  
1stLt Michael I. Neil, right, seen on Hill 41 with an artillery forward observer and a Vietnamese scout in December 1967. A year after attaining a law degree 1stLt Neil led a platoon against an estimated 100-man enemy force, for which he received the Navy Cross.

Star Medal and the Purple Heart. In the Korean War he commanded the 2d Battalion, 7th Marines, during the 1st Marine Division's withdrawal from the Chosin Reservoir and received the Navy Cross and a second Bronze Star. Upon returning to the United States, he attended law school, then served in a variety of legal and nonlegal billets. Through assignments at Headquarters Marine Corps he became closely associated with Marine Corps legislative affairs. In May 1967 he was promoted to the grade of brigadier general, the first Marine Corps officer selected for flag rank specifically considered "qualified for legal duty," in the words of the selection board's precept. Notably, he was not serving in a lawyer's billet when he was selected for general. At that time Colonel Charles B. Sevier was still the head of Discipline Branch at Headquarters. "Actually," General Lawrence said, "my legal experience, as far as court-martial work was concerned . . . was quite limited."<sup>95</sup> Upon learning of Colonel Lawrence's selection for promotion, Colonel Sevier and the rest of the Marine Corps legal community anticipated Discipline Branch becoming a separate, new division, Judge Advocate Division, with General Lawrence at its head.<sup>96</sup> Brigadier General Lawrence anticipated much the same thing, recalling that "[I] had been selected, initially, to be the head of the Discipline Branch at Headquarters."<sup>97</sup> Instead, he was assigned to be Deputy Assistant to the Secretary of Defense for Legislative Affairs, a billet in which he had great ex-



perience and expertise. General Earl E. Anderson, a former Assistant Commandant of the Marine Corps, recalled: "Marine Corps Headquarters made a concerted effort to have General Lawrence returned to head Judge Advocate Division, but the Office of the Secretary of Defense refused to release him."<sup>98</sup> Brigadier General Lawrence served in the Office of the Secretary of Defense until his retirement from the Marine Corps in November 1968. Then he was recalled to active duty to fill the same billet, which he did until 1972.

Colonel Sevier, who had served much of his Marine Corps career in law billets, continued to shepherd Discipline Branch's evolution into a separate division within Headquarters Marine Corps. Because he was too junior to be selected for promotion to brigadier general, Colonel Sevier was unconcerned that General Lawrence had been considered as his replacement at a higher grade.<sup>99</sup> Nor were other senior Marine law-

*The first Marine Corps general officer advanced to that grade specifically for duty as a lawyer was BGen James F. Lawrence, Jr. He was awarded the Navy Cross for heroism at the Chosin Reservoir in the Korean War.*

Department of Defense Photo (USMC) A413996



yers concerned that General Lawrence achieved promotion as a lawyer, despite a lack of significant time in military justice billets. As Brigadier General Faw later noted, after his having been the Director of the Judge Advocate Division, "he made his star that way [as a legislative affairs expert]. But anybody that got selected at that time would have had to make their star some other way than law. I'm convinced that I made mine some other way than law."<sup>100</sup> Still, for the first time a lawyer, James Lawrence, had been promoted to the grade of brigadier general as a lawyer. Though the star was worn by General Lawrence in a nonlegal assignment, the legal community knew that eventually he would either be reassigned to head a new legal division at Headquarters, or retire, making the brigadier general's grade available to another Marine Corps lawyer.

#### *Perspective*

One hundred and sixty-eight Marine lawyers were on active duty in 1965, 223 in 1966, and 277 in 1967.<sup>101</sup> That represented an increase of 64 percent, all lieutenants and captains, in two years.\* The number of general and special courts-martial, Marine Corps-wide, had increased from 4,824 to 7,091, or 47 percent, during the same period.<sup>102</sup> Most of the increase was in special courts, usually tried by nonlawyers at the battalion and group level. The kinds of cases that were being tried at the general court-martial level, and at the special court-martial level with lawyer counsel, were now more serious than the cases encountered prior to 1965. Murder, rape, and aggravated assault were not unusual, particularly in Vietnam, and required more lawyers, more legal support personnel, and more man-hours than anticipated in 1965.

Given the rapid growth in the lawyers' ranks and the steep increase in case numbers that was experienced, it was not surprising that the military justice system did not always operate with ideal smoothness. Captain Williams, whose infantry company had accompanied a party of lawyers into an unsecured area, thought that the legal process worked "in strange ways." He recalled that sometimes seven or eight courts would be pending, with no action taken for weeks and,

\*This number does not include five officers who then had law degrees, but did not practice law in the Marine Corps: Major General Avery R. Kier; Brigadier General Earl E. Anderson; Brigadier General George C. Axtell, Jr.; Colonel Herbert L. Beckington; and Colonel James T. Kisgen. (Brigadier General Anderson and Colonel Kisgen both, until shortly before the Vietnam War, served in legal billets, but no longer did so.)

sometimes, months. Meanwhile, the accused Marines remained in his company, with charges unresolved. Frustrated by the lack of action, Captain Williams urged the battalion commander to resolve the cases through nonjudicial punishment rather than wait any longer. Yet, in other instances, the system acted with a swiftness that amazed him, as when one of his squad leaders purposely shot and killed a Vietnamese farmer's water buffalo. Almost immediately, the Marine was pulled from the company, tried, and convicted. Captain Williams said that he "never figured rhyme or reason for the difference."<sup>103</sup>

The need for additional Marine lawyers became an increasingly higher priority. In May 1967 the Secretary of the Navy chartered a committee, chaired by a Navy lawyer, Rear Admiral George R. Muse, to de-

termine the requirements of both the Navy and the Marine Corps for uniformed lawyers. Colonel Sevier was the Marine Corps representative to the committee. The possibility of discontinuing all Marine lawyer billets and replacing them with Navy law specialists was discussed but ultimately rejected.<sup>104</sup> Instead, the Muse Committee recommended that 67 additional lawyer billets be authorized for the Marine Corps and that new lawyer procurement programs be initiated.<sup>105</sup>

Elsewhere in the naval service on 8 December 1967, after efforts spanning several years, legislation was passed that created a Navy Judge Advocate General's Corps. Henceforth Navy law specialists would be designated "judge advocates."

Anticipating the Marine Corps lawyer shortage, the Excess Leave Program (Law) was initiated in June

*The Commandant of the Marine Corps visited Vietnam in August 1967. General Wallace M. Greene, Jr., toured I Corps headquarters with Vietnamese LtGen Lam. III MAF Commanding General, LtGen Robert E. Cushman, Jr., is in the background. Gen Greene decided many of the issues that affected Marine Corps lawyers during the Vietnam War.*

Department of Defense Photo (USMC) A189011





Photo courtesy of Capt Dennis R. Zoerb, USMC (Ret.)

*Capt Michael E. Rich, left, a future director of the Judge Advocate Division, was an infantry company commander at Gio Linh in 1967. He and platoon leader 2dLt Dennis R. Zoerb hold the flak jacket and helmet of a Marine killed by an artillery round.*

*Among the first of the Marine Corps' "legal admin" officers, pictured before their promotions, are, from left, GySgt William S. Kirkpatrick, GySgt Kenneth W. Jones, unidentified nonlegal NCO, and MSgt Len E. Pierce, on Okinawa prior to their departure for Vietnam.*

Photo courtesy of Capt William S. Kirkpatrick, USMC (Ret.)



1967.<sup>106</sup> Officers already on active duty for a minimum of two years and a maximum of six years were allowed to apply for excess leave without pay to attend law school, with an obligation to serve an additional three years active duty as a lawyer upon graduation. This was viewed as a way to attract line officers to the legal field at little cost, while also encouraging them to remain on active duty as career officers.<sup>107</sup> Six officers entered the program in its first year and nine more followed in 1968.\*<sup>108</sup>

After a long gestation period constructive service credit for lawyers was authorized in December 1967.<sup>109</sup> Although not used until 1968, the original commissioning date of lawyers could now be revised, retroactively, for a period equalling the years spent in law school before becoming a Marine officer. The effect was to give lawyers that additional time in their current grade. Because eligibility for promotion was by lineal list seniority, this "leg up" on the promotion ladder made a Marine Corps commission more attractive to newly graduated civilian lawyers. It also put the Marines on an equal footing with the other Services, which had similar policies for their lawyers.<sup>110</sup> Until 1968, however, constructive service credit was available only to those lawyers who contracted to serve on active duty for four years. Those opting for only three years' service did not receive constructive service

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\*One of the nine was Captain Michael E. Rich, who commanded Company F, 2d Battalion, 9th Marines, while in Vietnam (and who took his LSAT examination in Da Nang). He received the Bronze Star Medal and the Purple Heart. After law school, among other assignments, he was the Staff Judge Advocate of the Marine Corps Logistics Base, Barstow, the 1st and 3d Marine Divisions, and III MAF. Later he was a Distinguished Graduate of the Naval War College. In September 1988 he was promoted to the grade of brigadier general and became the 11th Director of the Judge Advocate Division.

and might not be promoted to captain until their period of active service was about to end. Admiral Joseph B. McDevitt, the Judge Advocate General of the Navy, questioned whether the requirement to volunteer for four years was a correct interpretation of the law, nevertheless, until 1968 that was how the law was applied.<sup>111</sup> Until then constructive service was a great inducement to "sign up" for four, rather than three years' service.

The Platoon Leaders' Class (Law) continued to be the principal source of newly commissioned lawyers. As PLC (Law) graduate, Captain H. Edward Moore, Jr., noted:

Most of the individuals who were in the PLC (Law) program did exceedingly well in the PLC program and in Basic School. For instance, at my graduation from PLC there were two of us in my company who were our platoon's honor men. The fact that . . . lawyers had to undergo the strenuous and demanding training required of all Marine Corps officers did, without doubt, contribute to our being much better lawyers . . . It has always been somewhat surprising to me that, in light of the fact that all . . . lawyers had to undergo a total of nine months of infantry training, that the Marine Corps did attract individuals with strong academic backgrounds . . . I found that the typical reserve lawyer was far above average in all respects.<sup>112</sup>

To relieve Marine lawyers from some of the burdensome administrative tasks that legal clerks were not qualified to carry out, a legal administrative officer pilot program was initiated at Camp Pendleton, California.<sup>113</sup> Chief Warrant Officer 4 Maynard K. "Sonny" Baird was the first such officer. He, and Chief Warrant Officer 4 Len E. Pierce, the first two "legal admin" officers, demonstrated the value of experienced nonlawyer officers in smoothing the administrative intricacies of the court-martial process. Their skills, and those of Marine Corps lawyers, would be severely tested in the next few years.

## CHAPTER 5

# 1968: High Tide

*1st Marine Division: Lawyers in the Storm's Eye—3d Marine Division: Every Marine a Rifleman  
1st Marine Aircraft Wing/Force Logistic Command: Doing Time at Da Nang—From a Lawyer's Case File:  
Civilian Court-martial—Drugs: 'High' Tide—Trying Cases—Trial Under Fire: Khe Sanh Court  
Legal Assistance, Claims, Reviews: Someone Has To Do It—Fragging: Friendly Fire With Malice  
Homicide on Patrol: Nothing Hidden—III MAF Brig Riot: Prisoner's Kangaroo Courts—Perspective*

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In January 1968 III MAF numbered over 100,000 Marines, sailors, and soldiers. Besides the 1st and 3d Marine Divisions, the 1st Marine Aircraft Wing, and Force Logistic Command (FLC), III MAF now included portions of the 5th Marine Division, the Army's 23d Infantry (Americal) Division, and nearly 3,000 Marines of the Seventh Fleet's two special landing forces.<sup>1</sup>

North Vietnamese Army large-unit operations, which had increased in late 1967, continued into 1968. To meet them, III MAF had shifted Marine forces northward, the resulting gaps being filled by U.S. Army troops. Construction of the strongpoint obstacle system, the "McNamara Wall," continued along the Demilitarized Zone (DMZ), despite strong enemy opposition and a shortage of men and materiel.

Operation Checkers, designed to relieve the 3d Marine Division from covering the approaches to Hue, was essentially completed by mid-January. The entire 3d Marine Division was deployed either along the DMZ or at Khe Sanh. In turn, the 1st Marine Division shifted one regiment northward to Phu Bai to cover the western approaches to Hue.

In late 1967 and in early 1968 the North Vietnamese launched a series of company-size attacks on Marine positions near the DMZ. Further south the 1st Marine Division engaged strong enemy forces throughout the southern portion of its tactical area of responsibility. Many signs indicated a major enemy offensive was imminent.<sup>2</sup> General William C. Westmoreland, Commander, U.S. Military Assistance Command, Vietnam (ComUS), wrote:

Quite apart from the assault on Khe Sanh and the presence there of two North Vietnamese divisions, the enemy threat in the north [in I Corps] was real and disturbing: another North Vietnamese division was in the DMZ north of the Rock Pile . . . . Another was just outside the gates of the vital Da Nang airfield; the equivalent of a reinforced division was at Hue; and two more were within the DMZ or just south of it near the coast—all together seven enemy divisions.<sup>3</sup>

The 1968 Tet Offensive began on 30 January when the Da Nang Airbase, Marble Mountain Air Facility,

and Chu Lai were all heavily rocketed. All provincial capitals had been marked for attack, but the main efforts were reserved for Hue and Da Nang. For 12 days heavy fighting raged throughout South Vietnam. As Marine Corps historian, Brigadier General Edwin H. Simmons later wrote:

The enemy's ambitions for the Tet offensive had been large. He had told his troops and his political cadre that the time had come for a general offensive and a popular uprising . . . . He did achieve considerable surprise. He did tear up lines of communication and cause widespread destruction and temporary chaos in the populated areas. But by the middle of February, he was through. He had not gained the popular support he expected. The American presence was unshaken.<sup>4</sup>

Task Force X-Ray, deactivated at Chu Lai in 1967, was reformed on 13 January 1968 at Phu Bai and assumed responsibility for the surrounding tactical area

*Col John L. Ostby was Task Force X-Ray's Chief of Staff and the former Staff Legal Officer, 1st Marine Division.*

Department of Defense Photo (USMC) A419003





Photo courtesy of Col Robert C. Lehnert, USMC (Ret.)

*The senior lawyers of the 1st Marine Division during 1967-68, greet Fleet Marine Force, Pacific's Staff Legal Officer in August 1967. LtCol William T. Westmoreland, Jr., right, is about to be relieved by Col John L. Ostby, second from left. Four months later Col Ostby became Task Force X-Ray's chief of staff and LtCol Clyde R. Mann, left, became SLO. They join Col Robert C. "Curly" Lehnert, second from right, FMFPac's SLO, on Hill 327.*

of responsibility. It quickly became engaged in the Tet Offensive. During the clearing of Hue, the brigade-sized unit was involved in some of the heaviest sustained combat of the war. From its reforming until its second deactivation on 16 August 1968, Task Force X-Ray's chief of staff was Colonel John L. Ostby, formerly the staff legal officer (SLO) of the 1st Marine Division.<sup>5</sup> By virtue of his World War II combat record as an infantry officer, Colonel Ostby was well-qualified for the post. He later received the Legion of Merit for his performance with TF X-Ray.<sup>6</sup>

During the Tet Offensive Captain Bernard A. Allen, Jr., a defense counsel with the 1st Marine Division, was dispatched to Hue to investigate reports of looting by Marines who had retaken the imperial citadel.<sup>7</sup> The reports were not substantiated, but Captain Allen was the sole lawyer involved in the offensive in a legal capacity.<sup>8</sup>

#### *1st Marine Division: Lawyers in the Storm's Eye*

It was relatively quiet for the 1st Marine Division as the year began. Rather than defend Da Nang from the heavily patrolled "rocket belt," extending in a semi-circle around the city, Major General Donn J. Robert-

son, the division's commanding general, decided to fan out in deeper-reaching operations which would keep enemy forces at arm's length.<sup>9</sup>

On 13 January Colonel Clyde R. Mann assumed the duties of the Division SLO when Colonel Ostby was transferred to Task Force X-Ray. In 1950 then-First Lieutenant Mann was the assistant operations officer of the 2d Marine Division, when he was selected for assignment to law school. Later, as a lieutenant colonel, he was assigned to Vietnam as the deputy SLO and had since been promoted to the grade of colonel.\*

By now the SLO's offices were well-established on the north slope of Hill 327: two Quonset huts for offices, one 80 feet long, the other somewhat shorter; and a plywood, tin-roofed, windowless, air-conditioned courtroom. When power was lost, a still-frequent occurrence, the courtroom was completely

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\*A former infantry officer and air observer, Colonel Mann was awarded the Legion of Merit following his duty in Vietnam. He went on to serve as SJA of MCRD, Parris Island, South Carolina, and then graduated with honors from the Naval War College. On 20 August 1971, he was promoted to the grade of brigadier general and became the fourth Director of the Judge Advocate Division.

darkened and had to be evacuated until power was restored. Although the Quonset huts occasionally slipped from their moorings, creating alarming inclines until repaired, conditions were adequate. The officers' quarters were further up the hillside in other SEAhuts, usually four to six men to a hut, with Vietnamese "hoochmaids" to clean, do laundry, and polish boots. The enlisted legal personnel lived in identical huts, five or six men to a hut. Like the officers' quarters, most of the enlisted hooches had both a small refrigerator and a small black and white television set.<sup>10</sup> Cold water showers were available.<sup>11</sup> Unlike 1st Marine Aircraft Wing legal personnel who enjoyed flush toilets, the head facilities were of the four- or six-hole variety.<sup>12</sup>

Sixteen lawyers were assigned to the division, an adequate number.<sup>13</sup> Among the 16 were five trial counsels, six defense counsels, and one review officer.<sup>14</sup> Each lawyer's caseload remained low, but included serious general court-martial offenses such as murder and negligent homicide.<sup>15</sup> Trial teams were frequently sent to outlying units. Eighteen enlisted men were assigned to the office. Once again, enlisted court reporters' lack

of adequate training was often a source of problems. Some came to Vietnam directly from boot camp with inadequate schooling. Of five newly assigned reporters Colonel Mann said: "They couldn't even type their names! I used one of them as a driver, and one as a coffee maker. I tried to get their MOSs changed."<sup>16</sup> The FLC reporter schools, which had eased the reporter problem in 1966 and 1967, had been forgotten.

One of several exceptions to the inadequate reporter syndrome was Sergeant R. Thomas Seymour, a 1967 Harvard law school graduate, who had been an unsuccessful Marine Corps officer candidate. "In addition to being an excellent court reporter, he was a platoon sergeant in my reaction company," recalled Captain W. Hays Parks, chief trial counsel for the division. "I shall always remember this Marine of slight build, weighed down with all of his equipment, hustling around his platoon, a blue streak of invective worthy of the saltiest gunnery sergeant streaming from his mouth, but grammatically perfect . . . I had great respect for him."<sup>17</sup>

For the first (and only) time, accused Marines who were assigned to distant division units were being

*By 1968 the 1st Marine Division SLO's offices and quarters were well-established on the north slope of Hill 327. Shown is the hooch of the deputy SLO, LtCol Daniel F. McConnell.*

Photo courtesy of Col Daniel F. McConnell. USMC (Ret.)



transferred to Headquarters Battalion on Hill 327.<sup>18</sup> In this way they were easily available to their defense counsels and the trial process, problems of travel and communication were avoided, and their operational commands were relieved of an administrative burden. It was an ideal solution to the lawyers' recurring difficulties, so long as the number of accused individuals brought in from the field remained low, their offenses were such that they could remain at liberty within the Headquarters Battalion area, and numerous accompanying witnesses were not required. Unfortunately, those circumstances often did not prevail, and the practice of transferring accused Marines to Headquarters Battalion did not continue for long.

The lawyer's lot was not all work. Marines could check out basketballs and volleyballs from division special services.<sup>19</sup> Even skin-diving equipment was available. Several legal clerks dived regularly at the U.S. Navy Seal Base beach, beyond the Tien Sha deep water pier.<sup>20</sup>

*3d Marine Division: Every Marine a Rifleman*

The tempo of combat operations had increased in

the 3d Marine Division as well as in the 1st. On 10 January 1968 elements of the 3d Division Headquarters moved north from Phu Bai to Dong Ha. On 7 March Colonel Eugene B. "Doc" Fallon's legal personnel moved to Quang Tri, which was a few miles short of the Division's forward elements at Dong Ha. For the next four days, without lights, communications, or power, the attorneys and legal clerks dug fighting holes and bunkers.<sup>21</sup> The 20 lawyers and other staff officers drew M16 rifles and ammunition and were assigned defensive positions. Colonel Fallon had responsibility for coordinating the defense of a section of the perimeter while camp construction continued. Office huts had first priority, so officers and men again were billeted in tents until SEAhuts were raised. Throughout this period courts-martial continued to be tried despite occasional enemy rocket and mortar fire and, sometimes, friendly fire. Captain Richard D. Lane's diary entry for 27 April read: "At 1100 I was sitting in the courtroom observing a trial when we took incoming . . . . It was [friendly] RVN troops. They erred."<sup>22</sup> There were no casualties.

The deputy SLO, Lieutenant Colonel Paul F. Hen-

*Vietnamese "hoochmaids" did laundry and cleaning for officers and enlisted Marines. These women worked in the lawyer's tents at Camp Books, Red Beach, near Da Nang.*

Photo courtesy of Col Charles R. Larouche, USMC (Ret.)







Photo courtesy of Mr. Jerald D. Crow

*The 3d Marine Division SLO's trial counsel office was at Quang Tri in September 1968.  
"We didn't have the luxury of sending people back to sit in a brig for a month or two."*

derson, Jr., recalled, "[When] there was incoming while a court-martial was in session . . . you can believe there was no formal declaration of a recess as everyone exited and made for the nearest hole."<sup>23</sup> During one shelling a mortar fragment killed a court member as he lay on the courtroom floor.<sup>24</sup>

Coincidentally, Captain Jerome R. Klukas, a 3d Marine Division lawyer, was assigned to the Division Inspector's office as the friendly fire investigator. Whenever there was an injury resulting from friendly fire, Captain Klukas investigated the incident. Sadly, it was a full-time job.<sup>25</sup>

Throughout 1968 the caseload in the 3d Marine Division tended to be higher than that of the 1st Division, probably because there were more personnel in the 3d than in the 1st. In June, for example, 3d Division lawyers tried only three general courts-martial, though six trial teams visited subordinate units, and tried numerous special courts with each visit. Thus, a lawyer could try 104 cases, 97 of them specials, in a 13-month tour, as Captain Clarke C. Barnes did.<sup>26</sup> Legal assistance continued to be heavily employed, as well, with 85 cases handled in a typical month.<sup>27</sup>

In 3d Marine Division cases a court-martial sentence to confinement often was not carried out. "Unless a guy really got convicted of something serious . . . they

stayed at the firebase, because we didn't have the luxury of sending people back to sit in a brig for a month or two," the division chief of staff recalled.<sup>28</sup> A full 13 months of "good time" was required, before one was eligible for a return to the United States. Time spent in the brig was "bad time" and was deducted from the prisoner's time in country.

In the 3d Marine Division a shortage of junior officers had developed. Infantry platoon commanders, particularly, were needed. The shortfall was addressed by a lawyer, Colonel Joseph R. Motelewski. Colonel Motelewski already had a law degree when he enlisted in the Marine Corps in May 1942. Commissioned a second lieutenant five months after enlisting, he saw combat on Guadalcanal and Peleliu as an infantry officer. In Korea he had been a legal officer in the early part of his tour and, later, was executive officer and, briefly, commander of the 1st Battalion, 7th Marines.

Colonel Motelewski arrived at 3d Marine Division Headquarters at Dong Ha, anticipating assignment as the Division SLO. Instead, on 7 September, the commanding general, Major General Raymond G. Davis, designated him the division's chief of staff. No lawyer had been chief of staff of a division in combat before. When asked why he was selected, Colonel Motelewski replied:



Photo courtesy of Mr. Jeffery W. Maurer

*Capt Philip S. Keith is shown preparing for trial at Quang Tri in 1968. Military reporter volumes are at right and a "short-timer's calendar" is just above Capt Keith's head.*

I don't know. I know there were a lot of colonels whose butts were burned—who felt really upset about that. Of course, when I went to General Davis I told him, in Korea I had primarily been in legal work . . . I wanted him to understand what he was getting. He told me, "Don't worry about it." He said he knew enough about me that he "was confident."<sup>29</sup>

During Colonel Motelewski's tenure as chief of staff, Lieutenant Colonel Rollin Q. Blakeslee was the division's deputy SLO, having succeeded Colonel Fallon. Colonel Blakeslee was away on other tasks much of the time, however, "So," as Colonel Motelewski recalled, "[Captain David J.] Cassady handled the legal shop and he did an outstanding job."<sup>30</sup>

To relieve the shortage of infantry lieutenants Colonel Motelewski, with General Davis' approval, authorized volunteers from the division staff sections to become platoon leaders on a temporary basis. Lawyer lieutenants, Reserve officers all, leaped at the opportunity. The lawyers' workload was manageable enough that one officer's cases could be shifted to the other lawyers remaining in the legal office. While lawyers had not previously been regularly employed as platoon commanders in Vietnam, there was no reason why they could not be. As Commandants had insisted since the 1950 Uniform Code of Military Justice became effective, all Marine Corps officers, including

*The Chief of Staff of the 3d Marine Division, Col Joseph R. Motelewski, shown here in a 1965 photograph, was originally slated to be the Division SLO.*

Marine Corps Historical Collection

