

Photo courtesy of Mr. Jerald D. Crow

*Quang Tri had no hoochmaids. These were a 3d Marine Division lawyer's quarters in September 1968. A sandbagged bunker may be seen outside the tent's rolled-up sidewall.*

lawyers, were unrestricted in the assignments they could assume, commensurate with their grade. Regarding the call for volunteer platoon leaders, Colonel Motelewski explained:

And from that we grew into, "Well, let's assign [all lieutenants] up there for two or three months." . . . Once we assigned a lawyer up there, particularly when they just came in-country, they wanted to stay up there! They wanted to get at it, even though they knew they were lawyers [and weren't required to] . . . Their battalion commanders or company commanders would go to bat for them . . . Nobody's arm was twisted, and it wasn't held against anybody if he didn't go . . . It was the greatest thing in the world, because when these guys came back and subsequently went out to firebases [on trial teams], they knew what the hell they were talking about.<sup>31</sup>

So, what began as a call for volunteers from the division headquarters evolved into an unwritten practice

of assigning all willing lieutenants, including lawyers, to be infantry platoon commanders for three months. On several occasions, captain-lawyers were appointed company commanders. The practice continued for roughly the next six months.

During that period lawyer First Lieutenant David G. Moore earned the Bronze Star Medal and Vietnamese Cross of Gallantry while a platoon leader in the 3d Battalion, 9th Marines. On a search and destroy operation his platoon came under heavy automatic weapons and mortar fire and one of his wounded men fell in a position exposed to enemy fire. Lieutenant Moore crawled to the wounded man, stood, threw him across his shoulders and, in the words of his citation, "fearlessly maneuvered through the intense hostile fire" to a place of safety. Lieutenant Moore

later received the Navy Commendation Medal for his service as a defense counsel.<sup>32</sup>

Lawyer First Lieutenant William T. Allison II did not volunteer for infantry duty, but nevertheless he found himself in the infantry.<sup>33</sup> As executive officer of Company I, 3d Battalion, 3d Marines he earned the Bronze Star Medal. While wounded Marines from his company were being evacuated, he led a team against North Vietnamese positions that had taken the medevac landing zone under fire. His daring assault accounted for numerous enemy dead. Later, he became commanding officer of the company and was awarded the Vietnamese Cross of Gallantry with silver star.<sup>34</sup>

On Mutter's Ridge, while commanding Headquarters and Service Company, 1st Battalion, 3d Marines, lawyer Captain William L. Fly was wounded in action.

He also was awarded the Vietnamese Cross of Gallantry with silver star.<sup>35</sup>

Captain William H. McAdam, Jr., while commanding officer of Company M, 3d Battalion, 3d Marines, earned the Bronze Star Medal for a night-long defense of his position, followed by an assault on North Vietnamese Army strongpoints which resulted in 36 enemy dead. As a trial counsel he, too, later earned the Navy Commendation Medal.<sup>36</sup>

Other lawyers who acted as platoon and company commanders were similarly recognized for their accomplishments and bravery under fire. A number of them also received decorations for their performance of duty as lawyers, after having served as infantry commanders.

In the 3d Division the Marine Corps demonstrated that every Marine, including lawyers, was indeed a rifleman. In no other service did a judge advocate or

*3d Marine Division legal personnel line up in front of the legal office at Quang Tri in mid-1968. Front, from left, Maj Ronald J. Kaye, 1stLt Boyd L. George, 1stLt Jeffery W. Maurer, Capt Harry L. Shorstein. Center, Capt Richard D. Lane, Capt Mahlon C. Schneider, Capt Sandy S. McMath, 1stLt P. Keith Keller, 1stLt M. Kevin Phalin, 1stLt Robert M. Lee. Rear, unidentified captain, Capt Charles E. Patterson, and Capt Philip S. Keith.*

Photo courtesy of Mr. Jeffery W. Maurer





Photo courtesy of Col Clarke C. Barnes, USMCR

*3d Marine Division lawyers pose at a Quang Tri Christmas party in 1968. Kneeling, from left, Capt Michael D. Schrunk and Capt David G. Moore. Rear, Capt Stanley L. Smith, Jr.; 1stLt Jerald D. Crow; Capt William L. Fly; Capt Clark A. Halderson; Capt W. Tommy Allison II; and Capt Clarke C. Barnes. Later, several acted as infantry commanders.*

law specialist without special training assume command or leadership of a combat unit.

*1st Marine Aircraft Wing/Force Logistic Command:  
Doing Time at Da Nang*

Colonel Robert C. "Curly" Lehnert and Major William H. J. Tiernan, who began the year with 10 lawyers under their leadership, continued as the SLO and deputy at the Da Nang Airbase.<sup>37</sup> The wing was under strength in legal clerks and reporters, but each lawyer's caseload was only four or five cases, which eased the shortage of enlisted men. As Captain Charles H. Mitchell noted: "We didn't have any work, to speak of . . . so you sort of looked around for the war. You'd take Rough Riders [armed truck convoys] and stuff like

that, and find out what the war was like."<sup>38</sup> As in most Marine Corps legal offices in Vietnam, lawyers volunteered to lead the perimeter guard and reaction units. Colonel Lehnert recalled that during the Tet Offensive most of the 1st Marine Aircraft Wing reaction units were led by lawyers.<sup>39</sup>

Force Logistic Command (FLC) remained at Red Beach, eight miles northwest of Da Nang. Lieutenant Colonel Verne L. "Bubs" Oliver continued as SLO. Early in the year his deputy, Lieutenant Colonel Richard E. Wray, was replaced by Major Michael Patrick Murray. They were supported by four trial and three defense counsels and a legal assistance lawyer. Although authorized six lawyers and 10 enlisted le-



Photo courtesy of Col Rufus C. Young IV, USMC (Ret.)

*The lawyers of the 1st Marine Aircraft Wing, seen at Da Nang Airbase in January 1968. From left, Capt Charles H. Mitchell; 1stLt Michael I. Walling; Capt Rufus C. Young; 2dLt Macauley Carter, Jr.; Capt William F. Whiting; Deputy SIO, Maj William H. J. Tierman; Capt Donald R. Pritchard; the SIO, Col Robert C. "Curly" Lehnert; Capt David B. King; Capt Walter A. Stewart, Jr.; Lt Jared O. Bauch, USN; and Capt John N. Post.*

*Home is where you hang it. Capt Robert W. Wachsmuth sits on his rack in a SEAhut in 1968. His wash basin is at left while his flak jacket and helmet hang nearby.*

Photo courtesy of Mr. Robert W. Wachsmuth







Photo courtesy of Mr. Robert W. Wachsmuth

*By 1968 FLC's legal offices had expanded well beyond the original former pig sty.*

gal clerks, FLC sought an increase to 16 attorneys. As it was, FLC lawyers provided support to two subordinate commands, Force Logistic Support Group (FLSG) A, at Phu Bai, and FLSG B, at Dong Ha and Quang Tri, as well as trying cases arising at III MAF Headquarters, all of I Corps' Combined Action Groups, and two U.S. Army detachments of the 1st Air Cavalry Division located near Red Beach. Having tried 83 cases in the last year, FLC's was the busiest legal office in Vietnam.<sup>40</sup> In 1968 the number of cases tried rose every month, escalating from 32 in January to a high of 67 in December. Roughly half the cases involved use or possession of hard drugs or marijuana.<sup>41</sup>

Working spaces and air-conditioned living quarters in the cement buildings of the 1st Marine Aircraft Wing were comfortable, although enemy sappers and rocket attacks were threats. The rocket attacks, although frequent, were often ineffective. An air support control officer who worked near the Da Nang Airbase, Second Lieutenant James A. Cathcart, said of the rocket attacks, that "there seemed something vaguely un-Marine-like about sitting in front of your tent in the squadron area, watching rockets come up out of the valley and impact around the airfield, while you sipped a beer and people acted as if it was a fireworks display."<sup>42</sup> (Lieutenant Cathcart later gained his law degree and attained the grade of colonel, having spent most of his Marine Corps career as a judge ad-

vocate.) Monsoon rains, hardly lethal but always memorable, were particularly heavy in 1968. On 14 October 10 inches fell at Da Nang, and on the 15th and 16th, another 15 inches fell.<sup>43</sup>

FLC, which lacked the more substantial structures of the wing, was even more discomforted by the rains and more endangered by rocket attacks. On 14 June a legal clerk, Lance Corporal G. E. Korson, was killed and several others wounded by an enemy rocket.<sup>44</sup>

Whenever the opportunity presented itself, FLC personnel took steps to improve the comfort and habitability of their camp. As Captain Robert W. Wachsmuth, an FLC counsel, recalled:

When units of the [Army] Air Cav Division began to arrive in force in I Corps . . . they bivouacked at Red Beach. The Marines were amazed and resentful of the abundance of new equipment furnished [them]. I specifically remember the Air Cav leaving behind hundreds of brand new cots when they pulled out on operations. Of course, we very resourcefully appropriated all of the equipment we could "salvage."<sup>45</sup>

Weather permitting, many lawyers undertook exercise programs. "I will wager," Captain Wachsmuth noted, "we were in better physical condition than any other lawyers in Vietnam. I attribute this to Major Mike Murray [deputy SLO], who insisted that we join him in his pursuit of physical fitness. At FLC we had a complete weight room and regularly ran three miles

during the lunch hour . . . I have never been in better physical condition.”<sup>46</sup>

In mid-year Lieutenant Colonel Frederick M. Haden relieved Lieutenant Colonel Oliver as FLC’s staff legal officer, and in August, Lieutenant Colonel Max G. Halliday replaced Colonel Lehnert as 1st Marine Aircraft Wing SLO.\* Lieutenant Colonel Halliday, who had been a company commander in World War II, was of a category of officer frequently encountered in Vietnam: a reservist voluntarily returning to active duty for a specified period—five years, in Colonel Halliday’s case.<sup>47</sup>

On 1 November President Lyndon B. Johnson halted all air, naval, and artillery bombardment of North Vietnam. On 3 November the Vietnamese Communists announced that they were ready to participate in peace talks.<sup>48</sup> But for Marine Corps lawyers, the war continued as before.

*From a Lawyer’s Case File: Civilian Court-martial*

In August of 1967 Mr. James H. Latney, a six-foot, four-inch, 46-year-old Bermudian able seaman off the SS *Amtank*, was drinking in “Mamasan’s,” a Vietnamese bar at My Khe Beach, Da Nang. The *Amtank* was a Military Sea Transportation Service contract ship carrying petroleum among Japan, the Philippines, Thailand, and Vietnam. Byethe A. Trimm was a shipmate of Latney’s.<sup>49</sup> Reportedly a former Marine who had received a bad conduct discharge, Trimm was described as a disagreeable individual with a history of goading Latney. As the two drank, they argued. Trimm threw a chair at Latney, who thereupon stabbed Trimm with a large pocket knife, killing him. The commotion brought Marine MPs from the nearby III MAF compound. They apprehended Latney and transported him to the only place available for safekeeping prisoners, the III MAF brig.<sup>50</sup>

Shortly, Colonel Duane L. Faw, III MAF assistant chief of staff and Headquarters SLO, received a telephone call from the American Embassy in Saigon. Colonel Faw recalled the conversation. “Look,” the Ambassador’s representative said, “the last thing we want to do is have the Vietnamese prosecute [another] American . . . Politically it’s unacceptable. There’s



Photo courtesy of Mr. Victor J. Haydel  
*Merchant Seaman James H. Latney was a civilian confined in Da Nang’s III MAF brig. Charged with murder, he was one of only four U.S. civilians who were tried by court-martial during the Vietnam War.*

got to be some solution to this. What do you recommend?”<sup>51</sup>

Sixteen years after the Pentilateral Agreement settled the question of jurisdiction over American military forces in Vietnam, the unresolved issue of American non-diplomatic civilians now required immediate resolution. The choices were to leave Mr. Latney’s trial to South Vietnamese courts, which had primary criminal jurisdiction, try him by U.S. court-martial, or remove him to a U.S. court outside Vietnam, where jurisdiction would be questionable. At that time two American civilian contractor employees were about to be tried by the Government of Vietnam for negligent homicide and aggravated assault, and a third American civilian was pending Vietnamese trial.<sup>52</sup> If Latney, too, were tried by the Vietnamese, it could become standard practice for American civilians who committed crimes to face Vietnamese courts. The U.S. Army had consistently opposed any attempt to court-martial civilians. Colonel George S. Prugh, the MACV Staff Judge Advocate through June 1966, later wrote:

It was our understanding of the U.S. law that we were without UCMJ jurisdiction under the circumstances. I recall briefing Ambassador Taylor and later Ambassador Lodge on this issue. Although each wanted the civilian offenders tried by court-martial, each . . . deferred to our recommenda-

\*In May 1972, after serving as the Deputy Director of the Judge Advocate Division, Colonel Halliday became the first Marine in recent times to be appointed Assistant Judge Advocate General of the Navy for Military Law. In July 1975, upon his retirement, he was advanced to the grade of brigadier general, the only Marine Corps Reserve judge advocate to achieve that grade.



Photo courtesy of Mr. Victor J. Haydel  
*Latney trial counsels Capts Victor J. Haydel and Charles J. Kall hold broom they referred to as "Norris." Latney's defense counsel was Col Norris C. Broome.*

tion that the most effective remedy, if trial was essential, was to be in a Vietnamese court.<sup>53</sup>

But in 1968, the Latney case was to break new ground. Among the American Embassy, the Office of the Secretary of Defense, the State Department, the Army MACV SJA, and Colonel Faw, they decided to recommend to the III MAF commander, Lieutenant General Cushman, that Latney be considered a person accompanying the Armed Forces in the field in time of war and within the jurisdictional scope of Article 2 of the Uniform Code of Military Justice (UCMJ). General Cushman adopted their recommendation. Latney's case would be handled by court-martial, as would any other homicide within Marine Corps jurisdiction.<sup>54</sup> MACV headquarters in Saigon, which had cognizance over such matters, sought a waiver of jurisdiction from the South Vietnamese Ministry of Justice that was granted.<sup>55</sup> In a confidential message to the Commandant, Lieutenant General Cushman accurately noted that "we can anticipate a great hue and cry about civilians being tried by military courts."<sup>56</sup>

FLC was selected as the command that would try

the case, over the objections of the SIO, Colonel Oliver, who observed:

Our command could care less about two merchant seamen in a fight where one ended knifing the other in some bar 15 miles from our command . . . We were in the midst of an ever-increasing caseload and a case of this magnitude would break our backs . . . If Latney were to be tried in Vietnam, he should be tried by the Naval Supply Command, as the ship the accused was on was under contract to them . . . Colonel Faw came up with the theory of "territorial jurisdiction." Since the M.P.s that apprehended Latney were from . . . FLC, FLC should try the case.<sup>57</sup>

As incumbent of the senior Marine Corps legal billet in Vietnam, Colonel Faw's decision that FLC try Latney prevailed. He also promised to provide FLC with additional manpower.

Lieutenant Colonel Norris C. Broome and Major Brian B. Kent were loaned to FLC from the 3d Marine Division and III MAF, respectively, to defend Mr. Latney. Lieutenant Colonel Broome had been one of the early Marine Corps lawyers assigned as an instructor at the Navy's Naval Justice School in Newport, Rhode Island.\* His employment in the case, and that of Major Kent, two experienced lawyers, would ease the workload on FLC's few attorneys and preclude any suggestion that Latney had been defended by inexperienced counsel. Until Lieutenant Colonel Broome and Major Kent were appointed, Captain George Tozi, Jr., had represented Latney. Captains Charles J. Kall and Victor J. Haydel were the trial counsels. The law officer was Lieutenant Colonel Donald E. Holben, whose reputation as a demanding jurist was well-known.

At trial the issue would not be guilt or innocence, because several people witnessed the killing. The questions, per Article 2, were whether Latney was "serving with or accompanying the Armed Forces," whether he was "in the field," and whether it was "time of war." Actually, the application of Article 2 of the UCMJ to Latney was on trial, and the resolution of pretrial jurisdictional motions would effectively decide the case.

\*He was the sixth. In March 1947, First Lieutenant Robert C. Lehnert, although not then a lawyer, was the first Marine Corps instructor at the U.S. Naval School (Naval Justice), at Port Huene, California. In April 1948 he was followed by Major William A. Murphy, a lawyer. Next, the first Marine Corps instructor at the redesignated Naval Justice School in its new location at Newport, was Major John L. Ostby, followed by Captain Arthur R. Petersen, Major Thomas B. Casey, and Major Broome. (Col Casey ltr to BGen Edwin H. Simmons, dtd 30Jan89, and Col Robert C. Lehnert ltr to author, dtd 1Feb89, both ltrs in Comment folder, Marines and Military Law in Vietnam, MCHC).



Photo courtesy of LtCol Brian B. Kent, USMC (Ret.)

*One of Latney's two defense counsels was Maj Brian B. Kent, assigned to III MAF's legal office. He was loaned to FLC to participate in the trial of the Latney court-martial.*

In preparation, Lieutenant Colonel Holben travelled to Saigon and Japan to carry out legal research. Although he had already tried two other civilians in Vietnam for relatively minor offenses, those cases had not raised the issues that the Latney case did. "Latney was probably the poorest case, as far as jurisdiction was concerned," Lieutenant Colonel Holben recalled.<sup>58</sup> Unlike most civilians living in Vietnam and entitled to PX and officers' club privileges, military medical care, and free mail privileges, Latney was essentially just passing through.

Prosecutors Kall and Haydel went to Saigon to investigate how the decision was made to court-martial Latney. Captain Kall recalled: "[We] were concerned that there might be some bad news in the files of MAC-V, e.g., 'This is a test case; even if there is no jurisdiction, get the Marines to prosecute him anyway; that sort of thing . . . Everything we found was neutral or quite appropriate.'" After five days in Saigon they went to Japan, accompanied by assistant defense counsel Captain Tozi, to take the depositions of crew-

men of the *Amtank*, then docked in Yokohama.<sup>59</sup> Mamasan, owner of the bar that was the crime scene, insisted that her deposition be taken at her place of business and refused to suspend business while the deposition was in progress.<sup>60</sup>

By now Captain Kall's 13-month tour of duty was completed and he returned to Camp Pendleton, California. But having been involved in the case for four months, his intimate knowledge of all that had transpired was missed. In January 1968 he voluntarily returned to Vietnam to see the case to completion.

Defense counsel Lieutenant Colonel Broome, accompanied by the returned trial counsel, Captain Kall, travelled to Washington, D.C., to take the deposition of Senator Herman E. Talmadge, "to plumb the depths of the constitutional underpinnings, or lack thereof, of the war in Vietnam," Captain Kall said. In the senator's office, with a court reporter at the ready, just as Colonel Broome's questioning was to begin, the trial counsel interrupted to *voir dire* — examine the witness as to his competence to give evidence on the subject.





Photo courtesy of Mr. Charles J. Kall  
*The owner of Mamasan's bar refused to close her establishment. The prosecution took her statement in the bar, between customers. Cpts Victor J. Haydel and Robert W. Wachsmuth, with paper, listen to translator.*

It quickly became apparent that the senator was not expert in constitutional law. Nevertheless, the deposition was taken and ultimately considered by the law officer for whatever weight it merited. Also considered at trial was a written jurisdictional opinion by Senator Sam J. Ervin, Jr.

In Vietnam, the night before the jurisdictional motion was to be heard by Lieutenant Colonel Holben, Captains Kall and Haydel were in a SEAhut near the courtroom formulating their arguments, when the sound of incoming enemy rockets was heard. They ran for the nearest bunker, but Captain Kall stopped to secure the classified documents they had been studying, "one of the least sensible acts I have ever performed," he later noted. As he fled the hut, an enemy rocket exploded 20 feet from Captain Kall, who was caught in the open. Amazingly, he was uninjured. A SEAhut near the courtroom and next door to the SJA's office was destroyed by a second rocket. The courtroom itself sustained heavy shrapnel damage, including decapitation of the carved wooden figure of Justice With Scales, with which Major Ziemann had decorated the law officer's bench two years before.

*This Quonset hut near FLC's courtroom, was destroyed the night before the Latney trial. Although 20 feet from an exploding rocket, Capt Charles J. Kall escaped injury.*

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



FLC's staff legal officer, Lieutenant Colonel Oliver, decided that Captain Kall had done enough for one whose tour of duty had been completed months before, and returned him to Camp Pendleton. Captain H. Edward Moore replaced him just as the trial began.

The next morning, with the adjacent hut leveled and still smoldering, and shrapnel damage to the courtroom unrepaired, the law officer accepted the government's argument that they were in the field in time of war. The court decided it had jurisdiction to try Seaman Latney.

The critical pretrial motions having been decided in the government's favor, the trial itself was anticlimactic. On 25 February 1968, Latney, who had been charged with premeditated murder, was convicted of the lesser included offense of unpremeditated murder and sentenced to confinement at hard labor for 15 years.<sup>61</sup> The law officer, Lieutenant Colonel Holben, remembered:

After the trial, the president [senior member] was reported to have said something to the effect that they [the members] couldn't fully comprehend all of the instructions . . . but they knew he was guilty of something, so they settled on the lesser included offense . . . Substantial justice was accomplished at the trial level, all any sensible lawyer can hope to achieve.<sup>62</sup>

Administratively the case remained difficult, even after its completion. The record of trial was about 700 pages long, not counting roughly 250 exhibits. As Colonel Oliver recalled, "everyone and his brother wanted a copy of the record, . . . some 26 copies."<sup>63</sup> Before xerography was common, copies, each with four carbons, were manually typed—a staggering task in this instance. However, Colonel Oliver encountered a stroke of luck. Returning from a conference in Hawaii, Colonel Oliver had a day's layover on Okinawa. "In the officers' club . . . I struck up a conversation with a civilian who turned out to be . . . in charge of the Government Printing Office on Okinawa. I did not realize we had such an office there."<sup>64</sup> Back in Vietnam, printing of the record at the Okinawa Government Printing Office was authorized and funding was approved. FLC reporters typed one original record of trial and one copy. Twenty-five additional printed copies were available in three weeks.

As Latney sat in the III MAF brig awaiting transportation to a federal facility in the United States, the lawyers involved in his case anticipated the appeal that was sure to follow. The Latney case was not over, and the precedent it established, that courts-martial had



Department of Defense Photo (USMC) A413166

*"They were tried, convicted, and heaved out . . . ."*  
MajGen Raymond G. Davis, Commanding General,  
3d Marine Division, took a tough stand on marijuana.

jurisdiction to try civilians in a combat zone, was only temporary.\*

#### *Drugs: 'High' Tide*

By 1968 the use of marijuana by Marines in rear areas was becoming epidemic. Vietnamese sellers did not have to be sought out, they had to be fended off. The price was cheap, even on a private's pay. Sometimes marijuana was literally given away. Vietnamese authorities had little interest in interdicting the trade, and U.S. authorities had little success in doing so. Colonel Peter J. Mulroney, commanding officer of the 12th Marines, remembered:

Its use is more widespread than anyone would care to admit. Every one of my battalions had investigations going all the time. It is almost impossible to keep somebody that wants to get marijuana from getting it. [It's] sold at every road-

\*A total of four U.S. civilians were tried by military courts-martial during the Vietnam war. (Prugh, *Law At War*, pp. 109-110). *Latney v. Ignatius*, the appeal that resulted from Latney's conviction, and *United States v. Averette*, the later Vietnam court-martial involving a civilian accused that settled the jurisdictional question, are detailed in Chapter 8.

side ville, peddled by all the civilians . . . . You would have to have an officer or staff NCO on every vehicle to keep them from getting it . . . . The other point to make is misplaced loyalty. Some of the young officers and even some of the staff NCOs that have a man that does a good job in the daytime—after hours, if there is such a thing in Vietnam, he isn't going to pay attention to what that man does, or isn't going to place him on report. That is misplaced loyalty.<sup>65</sup>

In 1968 marijuana was usually confined to areas where there was seldom enemy contact. The 3d Marine Division's commander, Major General Raymond G. Davis, pointed out that "there is no drug problem out in the hinterlands, because there was a self-policing by the troops themselves. Their life depended on a clear head, and they would just not permit anybody to smoke a marijuana cigarette, or consume drugs."<sup>66</sup> Commenting on the disciplinary action taken upon discovery of drugs, General Davis continued:

At that time, anyone caught with as much as a half-inch of marijuana cigarette in their pocket was given a discharge from the Marine Corps. They were tried, convicted, and heaved out . . . . During my review of trials, where there was no other evidence except this very small piece of a cigarette, I let the conviction stand, but [directed] a year's probation.<sup>67</sup>

While General Davis' description of the court-martial process took a few intermediate in-court steps for granted, it correctly reflected the serious disciplinary approach being taken in attempting to reverse the rising tide of marijuana use. Lieutenant Colonel Jaeck, in his 1967 fact-finding report on drug abuse had noted that FLC referred all marijuana cases to a general court-martial as a matter of course. Other commands determined appropriate action "by the attitude of the commander."<sup>68</sup> By 1968 most commanders were in agreement with the need for serious steps, and that made the marijuana problem a legal problem. Fortunately, although hard drugs were available, their use in Marine units was still rare.<sup>69</sup>

Military personnel were being arrested in R & R ports for importation of marijuana.<sup>70</sup> Not even the Da Nang brig was free from the problem. Colonel James W. Shank, the III MAF Inspector noted that "the boys out of the brig, when they're travelling back and forth to where ever they're working, why, the civilians will throw marijuana into the truck for the boys, so the problem of keeping marijuana out of the brig has been a big one."<sup>71</sup> It was not always solved successfully. Captain Wachsmuth recalled one of his cases:

Members of brig working parties would obtain marijuana seeds [which were] planted in rows of dirt above the shower stalls which were opened to the outside by the gap

between the tin roof and the wall . . . . Spray from the prisoners' showers would water the plants. When the plants reached a sufficient size, plastic . . . would be placed between the shower spray and the plant, causing the plant to die. The plants would then be crushed and rolled in toilet paper to make joints. We were never able to identify any individual prisoner being directly involved.<sup>72</sup>

Occasionally, marijuana was turned to a positive end, if one were detailed to transport it to Japan for analysis. In 1968, at Long Binh, the Army opened the only crime laboratory in Vietnam available to U.S. Armed Forces.<sup>73</sup> If the Long Binh laboratory was backlogged, or if a case had to be tried quickly to avoid end-of-tour rotation dates, a Marine Corps lawyer or enlisted clerk would travel to the crime lab at Camp Zama, Japan, to secure the documentation necessary for in-court use.\* Upon arriving, the Marine's first question usually was how long the analysis would take. The reply often was, "How long do you want it to take?"<sup>74</sup>

#### *Trying Cases*

Special courts-martial often were still tried by non-lawyers at the battalion and group level, although visiting trial teams commonly tried any pending cases. Since the major commands all had detachments in locations separate from their headquarters, each command had adopted the trial team concept by 1968. A trial team usually consisted of two lawyers: a trial and a defense counsel. If a complex or unusual case was anticipated, a third lawyer might join the team to act as the senior member. Court reporters were still assigned to individual battalions or squadrons, as well as to the various legal offices. Captain Clarke C. Barnes, a 3d Marine Division lawyer, recalled: "Courts were held in the field in bunkers, tents, S-1 hooches at the battalion rear, et cetera . . . . The practice was to go to the field where the witnesses were, to investigate and develop a case, or see a convening authority, causing the least amount of operational interference possible."<sup>75</sup>

Travel between commands remained haphazard and dependent on the persistence and ingenuity of the lawyers involved. Only rarely were vehicles assigned to legal offices and lawyers often took to the road, usually hitchhiking.<sup>76</sup> Inadvertent trips down enemy controlled roads and helicopters forced down by mechanical failure remained unremarkable occurrences.<sup>77</sup>

\*Simple tests to confirm a substance to be marijuana took up to 60 days at the Long Binh laboratory. If sent by mail, the Camp Zama lab could take as long as three months. (Mann intvw).



Photo courtesy of Col Rufus C. Young IV, USMC (Ret.)

*1st Marine Aircraft Wing trial teams frequently brought legal services to the field. Cpts Donald R. Pritchard, left, and Rufus C. Young, at CAP unit F-4 in January 1968.*

Equipment problems persisted, too. In the 3d Marine Division the year began with three out of 10 portable Grey Keynoters working. At mid-year, two of 10 were functioning. The only effective method of repair required hand-carrying the units to Okinawa or Japan.<sup>78</sup> The 1st Marine Division had adhered to usual repair practice and turned in their inoperative Keynoters to 1st Force Service Regiment for repair. Now eight of those machines were missing and never recovered.<sup>79</sup> In self-defense three court reporters were sent to Japan to attend a Grey maintenance and repair course.<sup>80</sup>

Colonel John R. DeBarr, a law officer, noted that cases were being lost because of equipment that malfunctioned in the course of trial.<sup>81</sup> Typically, that occurred when an appellate defense counsel in Washington saw a reporter's notation in a record of trial that the testimony was "reconstructed," because the recorder quit working in the midst of a witness' testimony. If the appellate court considered the missing verbatim testimony substantial and critical to the defense, it was obliged to reverse the guilty verdict.

Rotation tour dates (RTDs), the scheduled dates that Marines returned to the United States, always concerned lawyers, convening authorities, and witnesses, but no cases are known to have suffered because of

RTD-induced memory lapses. Commonly however, participants in pending trials asked, "My RTD's coming up. Can't you just take my statement and use it in court?" Captain Barnes recalled:

The more senior the witness, the greater the flap . . . . On occasion Colonel Mo [J. R. Motelewski, the 3d Marine Division chief of staff] would counsel convening authorities who expected the trial counsel or defense counsel to waive the right to confrontation, but for the most part everyone cooperated. After all, everyone in the [legal] office wanted to rotate on time, also. So everyone worked hard to bring to trial quickly, cases where witnesses were on legal hold.<sup>82</sup>

Law officers, required for all general courts-martial, had worked out of Yokosuka, Japan, since before the Marines landed in Vietnam in 1965. A Marine Corps colonel and a Navy captain were normally assigned there. In 1968 the Yokosuka law officers were Colonel Alexander M. "Sandy" Hearn and Captain Wyman Jackson, JAGC, USN. Besides covering Japan and Vietnam, they heard cases at Subic Bay in the Philippines, on Okinawa, and, occasionally, on Guam. When in Vietnam they sat at the 1st Marine Division's Headquarters in Da Nang, FLC's Red Beach facility, and, for Navy cases, the Naval Support Activity at Tien Sha, near Da Nang. The law officers seldom knew what cases or issues they would encounter in Vietnam, but they were experienced enough to deal with most con-





Photo courtesy of Col William R. Eleazer, USMC (Ret.)

*A gas attack drill at FLC's Camp Books interrupted United States v. Montovon, a general court-martial involving the charge of murder. The testimony of a civilian defense witness, psychiatrist Dr. Pearman, masked man at right, continued after the drill's conclusion.*

tingencies. As Colonel Hearn noted, "Research materials were not a problem. At first, I tried to carry some materials, but soon abandoned that idea. As a practical matter, complicated legal issues seldom arose."<sup>83</sup> In late 1966 a Navy-Marine Corps Judicial Activity branch office opened at III MAF Headquarters in Da Nang to respond to in-country needs and ease the burden on the Yokosuka law officers, who spent a great deal of time travelling. Lieutenant Colonel William W. Wander, Jr., was the first law officer assigned to the new office, followed, a year later, by Lieutenant Colonel Donald E. Holben.<sup>84</sup> In May 1968 Colonel Holben turned over his duties to Colonel John R. DeBarr.\* The law officers found it to be a demanding billet, with trials virtually every day, and always with members as was required in general courts-martial of

that period. They considered their infrequent trips to Yokosuka and the Philippines to try cases almost as R & R.<sup>85</sup> One place not visited by a law officer, however, was Khe Sanh.

#### *Trial Under Fire: Khe Sanh Court*

At the beginning of 1968, three infantry battalions defended Khe Sanh. From January through March the base relied upon massive supporting arms fire to keep the enemy at bay. This included tactical aircraft sorties at the rate of nearly one every five minutes. B-52 bombers dropped over 75,000 tons of bombs around the base. U.S. Army and Marine Corps artillery fired nearly 1,500 rounds a day.<sup>86</sup> Yet the enemy still regularly placed heavy and accurate artillery, mortar, and rocket fire on Marine positions there.\*\*

\*The fifth Director of the Judge Advocate Division, Col DeBarr was promoted to the grade of brigadier general on 10 April 1974. In World War II he was an infantry platoon commander on Iwo Jima. In 1953-55 he served on the U.N. Truce Supervision Commission in Palestine, and later served as an appellate counsel, law officer, and military judge. In Vietnam, he tried 195 general courts-martial, including more than a dozen murders, in 12 months. In 1971 he advised President Nixon regarding the case of the United States v. Lt. William Calley, U.S. Army. (DeBarr 1986 intvw and Biographical Files, RefSec, MCHC)

\*\*The commanding officer of Khe Sanh combat base (and 26th Marines) was Colonel David E. Lownds. In April 1968 he relinquished command to Colonel Bruce F. Meyers, who had previously earned a law degree while stationed in Washington, D.C. Colonel Meyers said of his law degree, "I kept it off my record until just prior to retirement (I was an 03 [infantryman] and wished no part of the JAG bit). Had I taken a bar, it would have precluded my having [command of] . . . Special Landing Force Alpha, the 26th Marines, and The Basic School!" (Col B. F. Meyers ltr to BGen E. H. Simmons, dtd 7Dec87, Correspondence folder, Marines and Military Law in Vietnam file, MCHC).



Department of Defense Photo (USMC) A190685

*A special court-martial was tried in an underground Khe Sanh bunker in February 1968. After being convicted of sleeping on post the Marine was kept at Khe Sanh rather than being allowed to serve his sentence in the safer confines of Da Nang's III MAF brig.*

*An Air Force C-130, similar to the ones that delivered the court-martial counsels, sits on the runway at Khe Sanh with its cargo ramp lowered. Enemy artillery rounds land in the background and, moments after the photograph was taken, destroyed this aircraft.*

Photo courtesy of LtCol David Douglas Duncan, USMCR (Ret.)





Photo courtesy of Mr. Harry L. Shorstein

*"During the lulls we all filled sandbags and reinforced our positions." Capt Harry L. Shorstein, a 3rd Marine Division lawyer, was the prosecutor in a Khe Sanh special court-martial. He returned to Khe Sanh two months later as counsel in a formal investigation.*

Despite the constant and intense volume of fire, a Marine sentry, suspected of being in possession of marijuana, was found asleep at his post. In mid-February a special court-martial was convened by the commanding officer of the 1st Battalion, 26th Marines to try both charges. The counsels were Captain Harry L. Shorstein, a 3d Marine Division lawyer, and Captain Robert W. Wachsmuth of FLC.

The C-130 in which Captain Shorstein was a passenger landed at Khe Sanh under heavy artillery, rocket, and mortar fire. Captain Wachsmuth arrived a short time later, the only passenger on another C-130. Captain Wachsmuth said "the crew warned me that when they touched down, we would immediately receive incoming mortar fire. I was instructed to run down the [rear facing] ramp after all the cargo had been off-loaded, as the aircraft would only be [making a] touch-and-go, i.e., a 'rolling stop.' "

After several days of investigation and court preparation, the trial was conducted in the underground command bunker of the 26th Marines. The lawyers did not anticipate a bad conduct discharge, and they made no effort to make a verbatim record of the trial.

The court acquitted the accused of marijuana possession but convicted him of sleeping on post. The members sentenced him to a reduction in grade and forfeitures. "The sentence was appropriate," thought Captain Wachsmuth. "The accused was not sent back to the brig or otherwise allowed to escape the confines of Khe Sanh."

After the court-martial, Captain Wachsmuth departed as he had arrived, by leaping aboard the lowered ramp of a moving C-130, while incoming enemy fire rained down. Captain Shorstein remained at Khe Sanh for several more days. "I stayed because . . . fixed-wing aircraft were not coming in and the choppers were full of medevacs . . . . During the lulls [in shelling] we all filled sandbags and reinforced our positions." During his stay he provided legal assistance to the Khe Sanh Marines. (On 23 February, he also witnessed the worst shelling of the entire siege of Khe Sanh: 1,307 incoming rounds in an eight-hour period, during which 10 Marines were killed and 51 wounded.)<sup>87</sup> When the runway reopened, Captain Shorstein left Khe Sanh on an Air Force C-123. "[It] landed, troops exited without its stopping and I, and

others, jumped on while it taxied.”<sup>88</sup> Four months later the Marines abandoned the base.<sup>89</sup>

Captain Shorstein received the Bronze Star Medal and the Vietnamese Cross of Gallantry, in part for his actions at Khe Sanh.\* While numerous trials took place under sporadic enemy fire, few were as dramatic as the Khe Sanh court-martial.

*Legal Assistance, Claims, Reviews:  
Someone Has To Do It*

Marines were discovering that Marine Corps lawyers did more than try courts-martial. Legal assistance was for all Marines, and statistics reflected the growing appreciation of that fact. Marine Corps-wide, from 1965 through 1968, the legal assistance workload grew from 51,602 to 73,735 cases. In 1968 alone the major Marine Corps commands in Vietnam handled 4,561 legal assistance cases.

Requests to marry Vietnamese women became so common that legal assistance lawyers served on marriage counselling boards that were established by their commands.<sup>90</sup> Typically, a young Marine would fall in love while on R & R and propose marriage to his Vietnamese, Thai, Japanese, or Chinese girlfriend. Even if they were to marry, the bride might not be allowed to immigrate to the United States. If a background check revealed her to be a prostitute, immigration was certainly precluded and delicate and complex legal issues would likely follow. Captain W. Hays Parks noted other potential problems:

If the Marine did marry . . . once he got back to the United States he might decide that she didn't look as good to him as she did before, and simply walk away from her . . . . She

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\*Two months later, Captain Shorstein was again associated with events involving the Khe Sanh garrison. On 16 April 1968 a patrol of two platoons was engaged by the enemy near Khe Sanh. A fierce engagement ensued, eventually involving three companies. The Marines finally withdrew, leaving behind what turned out to be two wounded and 13 dead. Over the next two days attempts to rescue the wounded and recover the dead tragically failed. One of the wounded, Corporal Hubert H. Hunnicutt, was finally recovered and later received the Navy Cross. At Cam Lo, on 22 April, a formal investigation inquired into the debacle. Captain Shorstein was counsel to the commander of the battalion involved. Colonel Norris C. Broome, Assistant SIO of the 3d Marine Division, was counsel to the investigation. As Captain Shorstein said, “heads rolled, from the Task Force X-Ray commander on down.” The battalion commander was relieved for cause, and the regimental and task force commanders were given standard fitness reports. (Col Walter H. Cuenin ltr to CG, 3d MarDiv, Subj: Informal investigation into circumstances of a night operation conducted by the 1st Bn., 9th Marines, in the vicinity of Khe Sanh, on the night of 16-17 April 1968 (MCHC); and Harry L. Shorstein ltr to author, dtd 30Jan89, Comment folder, Marines and Military Law in Vietnam file, MCHC).

would call her nation's embassy [and] we would have a mini-diplomatic incident on our hands. Alternatively, the Marine would bring this woman home, and the Commandant of the Marine Corps would incur the wrath of some senator or congressman because a constituent (the Marine's parents) had called, asking why the Marine Corps had permitted their eighteen or nineteen year old son, whom they had entrusted to the Marine Corps, to marry.<sup>91</sup>

Division Order 1752.1 was the 1st Marine Division's effort to anticipate such problems. It required the commanding general's written permission before a Marine outside the United States could marry. Counseling by the division chaplain and a judge advocate and documentation of the prospective bride's background were required before that permission was given. “In Vietnam,” Captain Parks recalled, “we simply had an agreement with local authorities that they were not authorized to grant any marriage licenses to Marines without the commanding general's written permission—which, of course, he would not give.” Captain Parks continued:

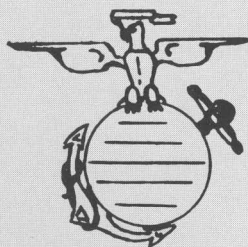
Practically speaking, a Marine would have to meet his prospective bride six months to a year before he ever came to Vietnam in order to wade through this intricate labyrinth during his tour. To my knowledge, only one Marine was successful in doing so. He was a major who had met and dated a Japanese woman . . . during the three-year tour at Yokosuka that preceded his Vietnam tour.<sup>92</sup>

The wide range of other legal assistance subject matter (wills, powers of attorney, adoptions, taxation, avoidance of civil action, citizenship, landlord-tenant, to name some of the more common topics) required skilled lawyers with a broad range of expertise.<sup>93</sup>

Vietnamese claims against the United States increased, as well. The ingenuity exhibited in devising fraudulent claims was impressive. For example, Captain C. Clarke Barnes, a 3d Marine Division lawyer, was once searching for a ride out of Da Nang. He walked down the road, keeping watch over his shoulder for a Marine Corps vehicle. As a Vietnamese three-wheeled bus approached him, a motorcyclist darted around the bus and into his path. Captain Barnes recalled:

I had just enough time to step out of the way . . . but his forehead hit . . . my right arm, extended with my val-pac in it. The little man was peeled off the motorcycle like he had been clotheslined . . . . He lay there momentarily and looked dead, then moaned and struggled to his feet . . . . About a week later I encountered the area foreign claims officer (Army). As I was relating my experience, the Army officer began laughing . . . . They had received a claim from a Vietnamese that a tank had collided with him, he had received a head injury, and his motorcycle was destroyed.





1 of 10

THE BEARER OF THIS PASS IS AN AUTHORIZED FOREIGN CLAIMS INVESTIGATOR FOR III MARINE AMPHIBIOUS FORCE IT IS HIS DUTY PROMPTLY AND FAIRLY TO INVESTIGATE CLAIMS IN THE III MAF AREA OF RESPONSIBILITY, TO FACILITATE THE EARLIEST POSSIBLE SETTLEMENT OF WORTHY CLAIMS AND TO PROMOTE FRIENDLY RELATIONSHIPS WITH THE VIETNAMESE PEOPLE. ALL WHO SEE THIS PASS ARE URGED TO GIVE THE BEARER ALL REASONABLE ASSISTANCE IN THE ACCOMPLISHMENT OF THIS MISSION

*T. H. Miller*  
CHIEF OF STAFF

Courtesy of Col Daniel F. McConnell, USMC (Ret.)

*The foreign claims investigator's pass issued to lawyers of the 1st Marine Division.*

The [claims] office had received no reports from Army or Marine tank units admitting to such an accident, and he said, "It's obvious, you're it, you're the tank!" The veracity of that claim was the same as every claim for restitution for water buffalos killed in the field: they are always female and always pregnant.<sup>94</sup>

Another function of the staff legal offices was to review courts-martial and one-officer investigations (the latter referred to as "JAG Manual" investigations after the Navy legal manual that contained investigation guidelines). The Navy law specialists, attached to each office, still had to review summary courts-martial and some special courts and attest to their legal correctness. JAG Manual investigations, usually conducted to resolve losses of government property or fix responsibility for accidents, could be reviewed by any lawyer. These administrative tasks, while not as exciting as others in the legal offices, were as necessary and important as those requiring courtroom appearance.

*Fragging: Friendly Fire With Malice*

The Vietnam war produced a form of felony that, although a part of all wars, had never been so widespread, so callously carried out, or so frequently

committed: the attack with intent to murder one's own officers and noncommissioned officers, most often by fragmentation hand grenade. The charge for the completed offense was premeditated murder. The cowardly act was commonly referred to as "fragging."

Such incidents, although hard to document, are part of the ugly lore of every conflict. The first verified incident involving the murder of a commander by his own troops occurred on 1 January 1781, when Pennsylvania soldiers of the Continental Army killed one of their captains.<sup>95</sup> In Vietnam fraggings were carried out for a variety of "reasons," including imagined wrongs, punishment for perceived over-zealousness in the performance of duty, for racial reasons, and simply to intimidate. Although there reportedly were such assaults as early as 1966, only in 1968 were they recognized as more than isolated occurrences. The Marine Corps did not keep fragging statistics until late in the war and then not in all commands. Official figures reflecting the number of these murders, or attempts to commit murder, and the number of deaths or wounding that resulted, are incomplete. The Marine Corps' total, based upon those incomplete statistics,

is estimated to be from 100 to 150 incidents for the entire war.\* Despite those estimated numbers, few deaths resulted from such attacks. (Army statistics are similarly fragmentary, although 527 incidents between 1969 and 1971 is a figure cited by several unofficial sources.)<sup>96</sup> A review of Vietnam-era Marine Corps appellate cases reveals no opinions relating to fragging.<sup>97</sup>

Those who committed the offense could not easily be identified, so there was little to deter or inhibit the criminally inclined Marine. As Colonel James W. Shank, the III MAF Inspector in 1968, pointed out: "There are no fingerprints on a grenade . . . . There is no reluctance at all for an individual who doesn't like his first sergeant, who doesn't like his major, to throw a grenade under his hooch."<sup>98</sup>

In a study of 28 soldiers convicted of fragging superiors, an Army psychiatrist reported that those convicted were dissatisfied with their job assignments and felt they were scapegoats or singled out for minor punishments within their units. Most were support personnel. The majority (87.5 percent) involved in the study were intoxicated by alcohol or drugs at the time of their offenses. They later lacked feelings of remorse and had little insight into their own behavior. Although a sample of 28 is too small to allow the drawing of firm conclusions, the study's author believed that neither racial tension nor political activism were significant causal factors.<sup>99</sup>

Most Marines found it difficult to believe that such cowardly, reprehensible acts could be committed by fellow Marines. The Commanding General of the Fleet Marine Force, Pacific, Lieutenant General Victor H. Krulak, said:

I remember my first experience with an enlisted man behaving in this way . . . . I was inspecting in Vietnam and I knew about a situation where a captain had lost an arm because of a grenade. The whole of our outfit was aghast at this and the individual was very quickly surfaced by his peers. I was inspecting the brig at Da Nang and I went into the maximum security area . . . asking them what they did and why they were there . . . . I came to this fellow and he was very reticent. He said, "Well, I'm in here for some little difficulty with my captain." The turnkey took me aside . . . . "This is the fellow that threw the grenade." I could tell that he was a pariah, that the rest of the Marines—and this is just 1968, mark you—that the rest of the Marines

\*The estimate is the author's, based upon reported fragging cases, the number of Marines in Vietnam, and the period during which fraggings were known to have occurred. Because fraggings were sometimes reported as enemy action, accident, or friendly fire, and because there was no requirement that suspected fraggings be reported to a central authority, any estimate, no matter how informed, is necessarily rough.



Photo courtesy of Col W. Hayes Parks, USMCR

*On 6 May 1968 two Vietnamese noncombatants were murdered on this bridge at Van Duong. Four Marine Corps investigators look for physical evidence.*

would have nothing to do with him. I was so emotional about being confronted with a man that would do this that I'm sure I violated the UCMJ and a lot of other things when I said, "I've found out who you are, you son-of-a-bitch, and I'll see you on the gallows!"<sup>100</sup>

The fragging cancer was just beginning. In the next two years it would occur frequently, usually among rear-area Marines.

#### *Homicide on Patrol: Nothing Hidden*

On 16 March 1968, Company C, Task Force Barker, of the Army's Americal Division, assaulted My Lai (4). Soldiers of the first platoon of Company C murdered 175 to 200 civilian noncombatants. An Army court-martial found First Lieutenant William L. Calley, U.S. Army, guilty of numerous offenses relating to the incident and sentenced him to dismissal from the Army and confinement at hard labor for life. Ultimately, the Secretary of the Army reduced the confinement portion of the sentence to 10 years and Calley was immediately eligible for parole.

On 5 May, a month and a half after the My Lai (4) incident, Lance Corporal Denzil R. Allen and five others from the 1st Battalion, 27th Marines, left their patrol base near Hue to establish an ambush. While moving to the ambush site they encountered two Vietnamese men, aged 50 and 53. After interrogating



Photo courtesy of Col W. Hayes Parks, USMCR  
*A member of the Marine Corps investigating team stands beneath the rafter from which Ho Cam, a 43-year old Vietnamese noncombatant, was hanged.*

them Lance Corporal Allen and Private Martin R. Alvarez stood the two Vietnamese beside a ditch and, on a count of three, shot them to death. Lance Corporal Allen turned and said to the others in the patrol, "You didn't see nothing." Later that night, after the patrol had returned to its base, the outpost was attacked by an enemy force. The next morning a patrol searched for enemy bodies. Instead, three Vietnamese male civilians, aged 32, 43, and 65, were taken into custody and brought back to the patrol base. The idea somehow developed that the Vietnamese should be put to death. Two of the prisoners were forced onto a footbridge and a "firing squad" allegedly consisting of Allen, Alvarez, Lance Corporals John D. Belknap, James A. Maushart, Private First Class Robert J. Vickers, and two others, formed. Again on the count of three, they shot the two Vietnamese to death. The bodies fell into a stream below, where they were again shot. Then hand grenades were dropped on the bodies. The group next forced the third Vietnamese into a building where Lance Corporals Allen, Belknap, and

Anthony Licciardo, Jr., hanged him. When the rope broke and the Vietnamese fell to the floor still alive, Allen cut the man's throat, killing him. The body was thrown into the stream and, as before, grenades were dropped on it.<sup>101</sup>

Several Marines refused to participate in the executions and immediately reported the incidents. The six participants charged with the murders and their squad leader, Sergeant James W. Adams, were referred to general courts-martial. Among the several trial counsels involved, those accused of the shootings were derisively referred to as "the magnificent seven," after the then-popular movie.

Four months later Lance Corporal Allen pleaded guilty to five specifications of unpremeditated murder. The law officer in Allen's case and in the trials of all of the co-accused was Colonel John R. DeBarr. The court members sentenced Allen to reduction to private, forfeiture of all pay and allowances, a dishonorable discharge, and confinement at hard labor for life. Prior to trial, Allen and his defense counsel, Captain Sandy S. McMath, had secured an agreement with the convening authority to limit confinement to 20 years in exchange for the guilty pleas. Later clemency action further reduced Allen's confinement to seven years. His later appellate assertion of incompetence of counsel failed to impress either the Court of Military Review or a Federal District Court.<sup>102</sup> (Nevertheless, he was paroled after having served only two years and 11 months confinement.)<sup>103</sup>

Lance Corporal Maushart pleaded guilty to one specification of unpremeditated murder and, through his Marine Corps lawyer and an individually requested Air Force judge advocate, secured a pretrial agreement to limit confinement to 10 years. The court members, unaware of the agreement (as required by military procedure), sentenced him to two years confinement at hard labor, plus the accompanying reduction, forfeitures, and dishonorable discharge usual in such serious cases. As provided for in the *Manual for Courts-Martial*, the lesser of the two possible sentences, that imposed by the court and that contained in the pretrial agreement, applied. Impressed by Maushart's evidence of apparent good character, the members recommended that all confinement over eight months be suspended. The convening authority rejected the recommendation. Maushart served a year and eight months confinement.<sup>104</sup>

Lance Corporals Belknap and Licciardo, both with pretrial agreements limiting confinement to 15 years,



Photo courtesy of Col William R. Eleazer, USMC (Ret.)

*Senior lawyers gathered on Hill 327. From left: Col Paul W. Seabaugh, III MAF SLO; LtCol William R. Eleazer; and 1st Marine Division SLO, Col Jack E. Hanthorn.*

pleaded guilty to single murders. Their courts sentenced both to two years confinement. Belknap served a year and three months; Licciardo served his full sentence.<sup>105</sup>

Private Alvarez, represented by First Lieutenant Thomas A. King and a civilian co-counsel, was found to lack mental responsibility and was thus adjudged not guilty.<sup>106</sup> Colonel Hanthorn, the SLO, arranged for Alvarez to return to the United States with his mother, who went to Vietnam to attend her son's court-martial held on Hill 327.<sup>107</sup> The squad leader, Sergeant Adams, received nonjudicial punishment from the division commander for dereliction of duty and failure to report his squad's offenses.<sup>108</sup>

Private First Class Vickers, the oldest accused at 25 years of age, pleaded not guilty to two specifications of unpremeditated murder of the two Vietnamese who had been executed by the "firing squad" on the footbridge. Although testimony placed him with the firing squad, Vickers swore that, just as he was approaching the footbridge to see what the commotion was about, the two victims had been killed. He also offered evidence of his veracity and good character in the form of laudatory letters from people who knew him from his pre-service civilian employment. The members, disbelieving his assertion of innocence, found him guilty of both murders.

As required by the UCMJ, Vickers' case was reviewed by the SLO, Colonel Hanthorn.\* Colonel Hanthorn had been informed by his chief trial counsel, Captain W. Hays Parks, of a post-trial conversation Captain Parks had with a court member who related that Vickers' conviction was partially based upon his greater age and his mere presence which, the members improperly reasoned, had encouraged the others.<sup>109</sup> Colonel Hanthorn recalled of the case:

Taking all this [veracity and character evidence] into consideration, and after much deliberation over the fact that the court had apparently not believed him, I concluded that I did believe him. Accordingly, I recommended to the CG that he disapprove the guilty findings. The CG studied the case very carefully [then] disapproved the guilty findings, and the accused was returned to duty. There was an interesting further development. The L.A. Times had been following the trials rather closely, and when the result of the CG's

\*"The convening authority shall refer the record of every general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority . . . . The review will include . . . his opinion as to the adequacy and weight of the evidence. . . ." Articles 85.b and 61, respectively, UCMJ. Colonel Hanthorn later wrote, "We are proud of the review system and believe that it is extremely fair and just . . . . Both lawyers and nonlawyers are . . . striving for the most nearly perfect system of justice that we can devise." (Col. Jack E. Hanthorn, "The Charge of the First Legal Division," *Harvard Law School Bulletin*, Mar-Apr69, p. 10.)



action was made known, the Times reporter came to talk to me. He couldn't understand why we had referred the case to trial since we had now dismissed it. I showed him my review of the case, with all my reasons, but he still didn't understand . . . . The reporter intimated that maybe we took the action because of some pressure, perhaps because the accused was the only black on trial. I am not sure that I ever convinced him that we were just honest people doing our jobs.<sup>110</sup>

In this case, unlike the My Lai courts-martials, all participants were tried within five months of the killings and, in five cases, convicted by courts-martial.

### *III MAF Brig Riot: Prisoner's Kangaroo Courts*

Lieutenant Colonel Joseph J. N. Gambardella was the commanding officer of the 3d Military Police Battalion, FLC, and the officer in charge of the III MAF brig. He had been concerned over the increasing brig population (from 175 prisoners in May to 298 in August) and the inmates' hostility. A prisoner, Private Talmadge D. Bert, later testified: "As a matter of practice and habit, we would harass and test the brig personnel . . . . To prove yourself you had to do something like . . . when told to stand up we would say, 'F-- you,' or something similar. Normally this would get us thrown in the cell block, and then we would be one of the gang."<sup>111</sup>

No specific factor ignited the riot of 16-18 August 1968. While racial overtones quickly surfaced, they were incidental to the riot's inception.\* Militant black prisoners also assumed leadership roles among the rioting prisoners, but as a guard, Staff Sergeant Heyssel, said: "It was spontaneous, and a mixed group, Negro and white." A black prisoner, Private Nolan J. Nunnery, said: "I don't know any specific grievances. As far as I am concerned, they didn't have any." Lieutenant Colonel Gambardella later pointed to one source of conflict:

The inconsistency of justice. There is a difference in the sentences, and I will give you an example. We have one sailor who was sentenced to 30 days for possession of marijuana. I have people in the brig sentenced to one year and a dishonorable discharge from a general court-martial [for the same offense]. That does not create any well-being among the prisoners, somebody else getting a hell of a lot less than them.

\*The sparse press accounts of the riot were reasonably accurate and objective, making no mention of race as a cause of the disturbance (e.g., *New York Times*, 19Aug68, sec.1, p. 5). Later authors, however, ascribe a racial basis for the events (e.g., David Cortright, *Soldiers in Revolt* [New York: Anchor Press/Doubleday, 1975], p. 40; James W. Gibson, *The Perfect War, Technowar in Vietnam* [Boston/New York: Atlantic Monthly Press, 1986], p. 217).

Indeed, that had been one of Lieutenant Colonel Jaeck's findings in his 1967 study of the marijuana problem. Lieutenant General Krulak had penned at the end of Colonel Jaeck's report, "We must attempt to establish more uniform standards of disciplinary action respecting marijuana offenses,"<sup>112</sup> but the pronounced differences in sentences from command to command persisted.

At 2210 on Friday, 16 August, prisoners were returning to the brig compound from a movie. Different participants recalled the incident starting in different ways. Whether it was Prisoner McDonald taking offense at the way a guard closed the gate in front of him, or whether Prisoner Webb jumped a guard after being reprimanded, brig personnel quickly lost control of the situation. While prisoners egged on both McDonald and Webb as they wrestled with brig personnel, the guards backed out of the compound. Warning shots were fired from the four guard towers, but, unhampered by guards inside the compound, prisoners ignored the shots and began destroying equipment and fixtures. Gates between internal areas were forced open and locks on prisoner SEAhuts and cells were broken off. Prisoners inside the compound stormed about, while their guards watched impotently from outside.

In the morning Lieutenant Colonel Gambardella, unarmed, entered the brig. For an hour he spoke to the prisoners and listened to their complaints. "I told them . . . I would do all in my power to expedite the legal process, and address the other grievances as best I could . . . . "I made this known to the commanding general, III MAF, who responded immediately, and that is how the brig [later] became flooded with lawyers."<sup>113</sup> At Lieutenant Colonel Gambardella's request, a judge advocate, Captain Martin E. Conway, Jr., was made available to advise Gambardella as he conducted meetings and issued directives.<sup>114</sup> For the rest of the morning the prisoner's response to anyone who approached the perimeter of the brig was to throw rocks and threaten to kill anyone attempting to enter the compound.

They did agree with Lieutenant Colonel Gambardella to talk about their "grievances," one-on-one, in the main control building. As prisoners later gathered in the building, however, they became unruly and began to destroy its contents and furnishings. They broke into the contraband locker and passed out hundreds of marijuana cigarettes they found there. Outside, now in complete control of the compound,

