prisoners burned what they could of the cinder block cell block, destroying it. As Colonel Gambardella recalled:

> We would have to use the force necessary, but at a time and place of our choosing. We could then minimize the contact between the brig personnel and the prisoners so there would be no physical injuries . . . . The safety of the prisoners and my own men . . . . This was of prime importance . . . . If you force them up against the wall, there is no place for them to run except towards you. If we did that we are going to get in a hell of a lot more trouble than we already had.

Throughout Saturday the prisoners remained in control of the brig, although there was no attempt to escape. "They would have been shot, had they tried," said an MP officer, First Lieutenant Jimmie W. Glenn. But while no prisoner escaped, brig authorities learned that several prisoners had been attacked by other prisoners during the night. Chief Warrant Officer Steven J. Mihalak, the Corrections Officer, said that "each one of the [eight] injured prisoners stated that they were subject to a kangaroo court. We had to bring Prisoner Rezzoffi out on a stretcher."

Prisoner Nunnery, a black Marine, underwent one of the "courts-martial." He later testified:

> Prisoner Gardner . . . said, "I am the judge." He also said that as far as he was concerned, everyone knew what the verdict was. He walked up to the side of my rack and took a swing at me . . . . I knew what the rest of them were going to do . . . . The guy that was my defense counsel, I didn't know him, tripped me, and the rest of them jumped on me. There were six [of them].

Prisoner Berry added, "They started beating on him . . . . I suggested throwing him in the ditch and burying him alive with sand bags. The guys were going to do this, but then somebody threw him [Nunnery] through the window and he ran away."

Berry described another Saturday afternoon "court:"

> [Seven prisoners] came in my hut and talked about a kangaroo court they had just held because he didn't participate and he was a dime-dropper. I don't know his name . . . . He had a jury, prosecution, defense counsel, and a judge, just like a regular court-martial, and had sentenced him to be beaten, which they all said they participated. They talked about the one they had pulled on Prisoner Zotts the night before (Friday) and had beaten him as their sentence.

At least 11 "courts-martial" were carried out by the prisoners.

Lieutenant Colonel Gambardella contacted Lieutenant Colonel Frederick M. Haden, FLC's Staff Legal Officer, and asked that he come to the brig to "get a firsthand feel of it." Major Donald E. Malone, the III MAF Assistant Provost Marshal, testified that "all of a sudden, a bunch of lawyers appeared." The prisoners were told of their arrival and availability for consultation. The lawyers' presence, however, failed to alter the standoff.

The prisoners remained in control of the brig's interior compound throughout Saturday and into Sunday. After the usual III MAF Sunday morning staff briefing, Lieutenant Colonel Gambardella explained the situation to the commanding general. "General Cushman asked me if I had control. I told him that I was going back and get it."

That afternoon he returned to the brig and announced to the prisoners that he would give them 15 minutes to surrender, or the compound would be taken by force, to include the use of tear gas. The prisoners, armed with clubs, sharpened screwdrivers, gasoline-soaked rags, and a gasoline-filled fire extinguisher employed as a makeshift flamethrower, responded by setting another fire and again challenging Lieutenant Colonel Gambardella.

Military Police First Lieutenant Glenn selected 12 Marines from the Headquarters Battalion reaction force, most of whom were sergeants with combat experience. He armed 10 of the men with baseball bats and two with shotguns. "Some of them," Lieutenant Glenn reported, "didn't like the idea that it was going to be 12 against 300." Lieutenant Glenn told the 12 that, if a prisoner attempted to attack them, they were to use the baseball bats. "I also told the men with the shotguns that if I pointed at a man, I wanted that man to be dropped right on the spot . . . . If they had time, to first fire a warning shot, and then shoot at the legs."

At 1530 Lieutenant Glenn formed his men in a wedge and approached the entrance to the sallyport, beyond which the prisoners waited.[115] Lieutenant Colonel Gambardella had posted a judge advocate and a photographer at each guard tower. "I was using them as witnesses . . . to prevent false accusations about the force we would use."[116] After donning gas masks, Lieutenant Glenn's detail tossed tear gas grenades into the compound.

The riot was over within minutes. "There was only one prisoner hit with a bat," Lieutenant Glenn recalled. The prisoner refused to enter a truck, so "he

Marine Corps Historical Collection

The first tear gas grenade detonates as it is thrown into the III MAF brig's sallyport. 1stLt Jimmie W. Glenn leans on a baseball bat. All 12 men of the detail wear gas masks.

The first prisoner surrenders as the tear gas is blown throughout the brig compound.

Marine Corps Historical Collection

Marine Corps Historical Collection

Tear gas permeates the III MAF brig, forcing rebellious confinees to surrender. As they abandon the compound they are herded to a holding area outside the brig fence line.

The takeover ended, 76 prisoners are held outside the compound. Prisoners used wet towels in an attempt to escape the tear gas. 1stLt Glenn is at lower center, without cover.

Marine Corps Historical Collection

was smacked across the back of the legs . . . . It only hurt his pride."*

While FLC lawyers formulated charges and III MAF engineers rebuilt the burned cell block, 31 suspected ringleaders were held on diminished rations in open dog cages in what had previously been the military police dog kennel. III MAF authorities did not consider the brig's SEAhuts, to which the other prisoners returned, secure enough to hold the ringleaders. As soon as transportation could be arranged, about 10 days later, all 31 were moved from the dog cages to brigs at Subic Bay and Sangley Point, in the Philippines, and Camp Butler, Okinawa.[117] Normally, FLC lawyers tried offenses occurring in the III MAF brig, but because of the large number of prisoners charged, responsibility for trial reverted to the prisoners' parent units.[118] The four principal ringleaders in the riot and subsequent kangaroo courts were Privates Michael A. Roberts, Stephen F. Brice, Calvin L. White, and Talmadge D. Berry. At the time of the riot all four had been serving sentences that included bad conduct discharges.[119] They now faced charges of mutiny, riot, conspiracy to assault other prisoners, and multiple assaults.[120] The command charged the other 27 principal actors with varying lesser offenses; most were to be tried by general courts-martial. First Lieutenant Curtis K. Oberhansly was the trial counsel in many of those cases.

The lawyers involved in prosecuting and defending the 31 accused Marines began a tedious series of trips back and forth among Vietnam, the Philippines, and Okinawa, although any case requiring a trip out of Vietnam had its advantages. ("And don't come back to the 'Nam without . . . a pair of size 11 and a pair of size 13 tennis shoes and a couple of pairs of medium handball gloves for yours truly," one Da Nang defense counsel wrote another.)[121]

In early 1969 Colonel John R. DeBarr tried the four main actors in the riot, Roberts, White, Brice, and Berry at Subic Bay Naval Station. Captain Michael J. Hoblock, Jr., who had never tried a contested case before, represented all four at their request. Co-defense counsel on the four cases was Navy judge advocate Lieutenant Jerry D. Rucker, on loan from Subic Bay's Navy Legal Service Office, where he was the chief defense counsel. Captain Hoblock and Lieutenant Rucker negotiated a package pretrial agreement with the convening authority that promised guilty pleas by White, Brice, and Berry to all charges except mutiny, in return for a limit on each accused's punishment of one year's confinement and a dishonorable discharge.[122]

Of the 31 accused, only Private Roberts pleaded not guilty to the Da Nang brig charges, and to new charges of mutiny and assault that arose from what Lieutenant Rucker called a "latenight hoorah" in the Subic Bay brig. Robert's case, like those of White, Brice, and Berry, was tried at Subic Bay.[123] Defended by his requested defense counsel, Lieutenant Rucker, and his assigned defense counsel, Captain Hoblock, the prosecutor was again Lieutenant Oberhansly.** Having already prosecuted guilty pleas to essentially the same events several times before, he proved Roberts' guilt only after a hard fought, seven-day trial in which defense motions resulted in half the charges being dismissed by the military judge. On 23 February 1969 the court sentenced Roberts to 15 years confinement at hard labor and a dishonorable discharge.*** All 31 ringleaders were convicted, most with pretrial agreements that insured their quick departure from Vietnam and a dishonorable discharge from the Marine Corps.[124]

Perspective

In the first half of 1968 the war's heaviest combat activity occurred, with the enemy's main effort centered on the two northern provinces. III MAF forces and the South Vietnamese repelled the enemy's incursions across the DMZ, ejected them from Hue, and defeated his attempts to take Khe Sanh. In May the enemy shifted his main attack southward against Da Nang and again met defeat. In the last half of the year the enemy pulled his major units back beyond the borders of Vietnam and reverted to small-unit tactics and harassment.[125]

Line officers in increasing numbers completed their Vietnam duty and began law school, to return later to active duty as lawyers. Major James P. McHenry was the operations officer of the 1st Battalion, 1st Marines.

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*Two weeks later, at the U.S. Army's Long Binh brig, a violent and protracted riot occurred. A few of the 719 prisoners controlled a portion of that brig for more than a month. Sixty prisoners and five guards were injured and six black prisoners were charged with conspiring and beating a white prisoner to death with a shovel. One murder conviction resulted. (*New York Times*, 1Oct68, p. 3, and 8Jan69, p. 12; David Cortright, *Soldiers in Revolt* [Garden City: Anchor Press/Doubleday, 1975], p. 40-41).

**During the trial, Lieutenant Oberhansly met, and six months later married, the daughter of Captain Robert H. Nicholson, the Naval Base Staff Judge Advocate. Lieutenant Oberhansly's best man was his courtroom opponent, Lieutenant Rucker.

***Roberts was released in February 1973, having served just under four years post-trial confinement.

He received the Bronze Star Medal and returned to the United States and law school through the excess leave program. He then continued his career as a judge advocate and attained the grade of colonel.[126] Captain Ronald C. Rachow provided ground defense for the Da Nang Airbase as a member of the 1st Military Police Battalion before becoming a judge advocate and, eventually, a lieutenant colonel and general court-martial military judge.[127] Captain Harry K. Jowers was an Army officer in Vietnam. In one remarkable year of combat he earned three Silver Star Medals, two Bronze Star Medals, four Purple Hearts, five Air Medals, and two Army Commendation Medals. After completing nine years in the Army and attending law school, he joined the Marine Corps as its most highly decorated judge advocate.[128] The value of such tested and experienced officers was proven in their leadership and direction of judge advocates and the legal community long after the war was over.

Judge Advocate Division came into being on 17 April 1968. In a reorganization of Headquarters Marine Corps effective that date, Discipline Branch (Code DK) was redesignated as the new division (with the correspondence code AI). Colonel Charles Sevier had led Discipline Branch since July 1966 and he continued as the first Director, Judge Advocate Division until August 1968. The new division was comprised of 15 officers, 10 enlisted men, and 14 civilians. It had four functional branches: Military Law; Research and Plans; Legal Assistance; and General Law, Regulations, and Reference. Colonel Sevier's official title was Director, Judge Advocate Division; Staff Judge Advocate for the Commandant of the Marine Corps. That title recognized the fact that there was only one Judge Advocate General in the Naval Service, the JAG of the Navy.[129]

At year's end an even 300 Marine Corps lawyers were on active duty. Brigadier General James Lawrence retired in November, but was immediately recalled to active duty to continue serving as Deputy Assistant to the Secretary of Defense (Legislative Affairs).[130] While he had remained unretired and on active duty, no other lawyer colonel would be selected for promotion to his grade, because Brigadier General Lawrence

Capt Ronald C. Rachow of the 1st Military Police Battalion takes a break outside Da Nang. He completed his Marine Corps career as a general court-martial military judge.

Photo courtesy of LtCol Ronald C. Rachow, USMC (Ret.)

Photo courtesy of Col Harry K. Jowers, USMC

Capt Harry K. Jowers, U.S. Army, second from right, was awarded one of his three Silver Star Medals by Adm John S. McCain, Jr., Commander-in-Chief, Pacific, on 17 September 1968. Capt Jowers later was a Marine Corps colonel and judge advocate. Marine MajGen Hugh M. Elwood, Assistant Chief of Staff (J-3), CinCPac, stands with hand on hip.

held the sole "qualified for legal duty" general's slot that had been authorized. Even after he retired and was recalled, it was two years before the annual brigadier general selection board was authorized to again select for promotion a colonel lawyer "qualified for legal duty."

Also on active duty were 21 lawyer colonels, 31 lieutenant colonels, a mere 18 majors, and 206 captains. (Captain Patricia A. Murphy was still the sole woman Marine Corps lawyer on active duty.*) Finally, 11 first lieutenants and 12 second lieutenants were on active duty.[131] The number of these officers who were serving in Vietnam at any given time varied, but was roughly between 60 and 70.

For the moment, the number of lawyers exceeded the number of billets requiring lawyers. This surplus resulted from several initiatives that came to fruition in 1968. The excess leave program, by which regular officers were granted up to three and a half years excess leave (without pay or allowances) to obtain a law degree, placed 15 officers in law school, nine of whom would soon return to active duty rolls. Another program had already returned six experienced lawyer reservists to active duty. Their seniority helped ease the continuing shortage of majors. In addition, the Platoon Leaders Class (PLC), Law was successfully recruiting newly graduated lawyers.

A Department of Defense Lawyer Working Group

*Captain Murphy became the first Marine Corps woman lawyer in Vietnam when, on 30 November 1968, she arrived from Okinawa, where she was assigned, to attend an I Corps Bar Association meeting held at the U.S. Air Force's Gunfighter's Officers Club, in Da Nang. Departing on 1 December, she was eligible for two months combat pay. (Parks 28Dec88 ltr., p. 11; and Halliday intvw.)

Photo courtesy of Col Curtis W. Olsen, USMC (Ret.)

Senior lawyers attended the Pacific Legal Conference at FMFPac Headquarters, Hawaii, in 1968. Front row, from left, Col Donald E. Holben; Col Paul W. Seabaugh; Col Marion G. Truesdale; Col Jack E. Hanthorn; Col Joseph R. Motelewski; Col Robert C. Lehnert; Col Charles B. Sevier; Col Verne L. Oliver. Second row, Maj Curtis W. Olson; LtCol William C. Jaeck; LtCol Frederick M. Haden; Col Arthur R. Petersen; Col John R. DeBarr; LtCol Max G. Halliday; LtCol Rollin Q. Blakeslee; Maj Joseph A. Mallery, Jr. Back row, Maj William H. J. Tiernan; Maj Lawrence G. Bohlin; and nonlawyer Capt Frederick B. Steves, FMFPac staff.

recommended lawyer incentive pay and bonuses for those lawyers who volunteered to extend their initial service obligation. The Group believed this would enhance retention. The recommendation, however, became mired in bureaucratic discussion and was not put into effect.[132] The next year, however, both the U.S. Senate and House would introduce bills providing for special pay and reenlistment bonuses for military lawyers.[133]

In 1968, for the first time, the Judge Advocate General of the Navy kept statistics on courts-martial tried in Vietnam: 148 general courts; 1,284 specials (the bulk of them tried by lawyers, though not required by the UCMJ); and 1,406 summary courts (virtually none of which involved lawyers) were tried.[134]

Since the beginning of the war, the number of courts-martial throughout the Corps had grown commensurate with the increase in manpower: a 62 percent rise in trials and a 65 percent increase in personnel. Significantly, however, the number of general courts-martial rose by 209 percent.[135] This reflected the lesser quality of recruit and the more serious offenses being committed. (Three percent of Marine Corps strength was now of the lowest intelligence group, Mental Category Group IV—"Cat four"—with projections of six percent and seven percent for the next two years.)[136]

In Vietnam, Marine Corps troop strength continued its steady climb, reaching a peak of 85,520 in September 1968. The departure of Regimental Landing Team 27 reversed that trend. By year's end about 81,000 Marines and sailors were in III MAF.[137]

Captain Donald Higginbotham of the 1st Marine Division's legal office wrote: "As ridiculous as it may sound to some, if I had one year of my life to live over, it would be the time I spent in Vietnam. Everything in my life since that time has seemed anticlimactic."[138]

PART III
WINDING DOWN

CHAPTER 6

1969 Preamble: Discipline in Disarray

The Military Justice Act of 1968: Evolutionary Fine-Tuning—Marijuana: Persons of Ill Repute—Racial Conflict: Black, White, and Green—Administrative Discharge: The Right Fix—Fragging: Killers In Our Midst—From A Lawyer's Case File: Murder of a Company Commander—Real or Imagined: The 'Mere Gook' Rule—Perspective

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Disciplinary problems foreshadowed in preceding years rose to troubling levels in 1969. While most Marines quietly carried out their duties without fanfare or disciplinary involvement, more and more of them were becoming enmeshed in the military justice system. Marijuana use, which increased dramatically in 1968, was virtually out of control in 1969. "Fraggings" were no longer unusual. Marine Corps draftees with antagonistic attitudes were more frequently encountered. Disciplinary incidents were no longer uncommon in combat elements and were alarmingly frequent in combat support units. Racial conflicts were becoming violent and more frequent. Tensions in American society were being reflected in America's military society.

Retired Marine Colonel Robert D. Heinl, Jr., expressed a disturbing view when he wrote: "The morale, discipline and battleworthiness of the U.S. Armed Forces are, with a few salient exceptions, lower and worse than at any time in this century and possibly in the history of the United States."[1] Marine Corps lawyers, reviewing burgeoning court dockets, would have agreed.

The Marine Corps was shocked by a July race riot at a Camp Lejeune, North Carolina, enlisted man's club. It resulted in the death of one Marine and the injury of 14 others.[2] A riot at the Camp Pendleton, California, brig in September further alarmed Marine Corps leaders.[3]

Gunnery Sergeant Joseph Lopez, an infantryman who returned to Vietnam for a third tour of duty in February 1969, said:

> At first I noticed the discipline of the troops was very lax . . . . Tell a man to square his cover away, tell him he was out of uniform, the man look at you like he was gonna kill you . . . . Never did I ever see anybody give a superior NCO the looks that these young men give us nowadays . . . . Once they was brought up on charges that should have warranted a court-martial and brig time, well, they didn't get no brig time or court-martial . . . . We're dealing with a different type of Marine, here . . . . We need more discipline in this Marine Corps, or we're going to lose out.[4]

"Where do we get these individuals—these young criminals in Marine uniform?" asked Colonel John R. DeBarr, a general court-martial military judge.[5]

In 1969 slightly more than 18,600 Mental Category IV enlistees were wearing Marine green—six percent of Marine Corps active duty strength. Although not all disciplinary problems were their fault, Project 100,000 individuals had a boot camp dropout rate more than twice that of other recruits and continued to have a higher disciplinary rate than other Marines.[6]

Marines now arrived in Vietnam for 12-, rather than 13-month tours of duty.[7] The 12-month tours brought the Marine Corps in line with the Army, which had always assigned one-year tours. But the continuous personnel turbulence meant that each rotation's lawyers tended to face the same problems as their predecessors; each year they rediscovered the same solutions.

Marine Corps attorneys were now assigned the 4400 legal MOS (Military Occupational Specialty) designator as a matter of course.[8] Besides entering an arena filled with legal challenges, new 4400s found that the military justice system itself was on the brink of a major change for the better.

The Military Justice Act of 1968: Evolutionary Fine-Tuning

Since the first court-martial guide, *Manual for Courts-Martial, U.S. Army* (1920), three other Army manuals had been in use.* A fourth came into use on 1 August 1969, when the Military Justice Act of 1968 became effective.[9] *Naval Courts and Boards*, the legal manual employed by the Navy and Marine Corps prior to the Uniform Code of Military Justice, first appeared in 1910. Revised editions were issued in 1917, 1923, and 1937. In 1969 the old "Red Book," the 1951 *Manual for Courts-Martial*, was to be replaced by a larger, loose-leaf volume.

In 1963 Senator Sam J. Ervin, Jr., introduced legislation to, as he put it, "perfect the administration of justice in the Armed Forces."[10] After lengthy hearings and delays the legislation became law. The Uniform

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**Manual for Courts-Martial, U.S. Army* (1928) and (1949) (the short-lived *Manual for Courts-Martial, U.S. Air Force* [1949] was virtually identical to the Army manual), and the *Manual for Courts-Martial* (1951). A draft proposal for a 1964 revision of the 1951 manual was completed but not adopted.

Code of Military Justice (UCMJ) of 1950 had been a landmark improvement in military law, but the years since its implementation had revealed flaws and gaps that the Military Justice Act of 1968, with its revised UCMJ, was designed to cure.

Among the changes, the act provided that an accused could not be tried by a summary court-martial (in which there was no right to a defense counsel or an independent judge or jury) over the accused's objection. Now, the accused could refuse a summary court and opt for a special court, where those rights would automatically be available.

Military trial procedures were brought more into line with federal court practice. The act added pre- and post-trial sessions involving the military judge, the accused, and both lawyers, but without the members.[11] At such sessions motions and procedural issues could be decided.

The designation "law officer" was changed to "military judge," and military judges were given authority roughly equivalent to that of federal district court judges. The act provided that a military judge was mandatory in any case in which a bad conduct discharge might be imposed. Effectively then, military judges would be required in virtually all special courts and, certainly, in all general courts-martial (where law officers had always been mandated). That provision was a compromise resulting from Congress' desire to see military judges in all special courts and the Armed Services' opposition to judges in any special court. Military judges were required to be certified for such duty. Special court-martial military judges remained in the normal chain of command. General court-martial judges, however, would be responsible only to their Service's Judge Advocate General (JAG). Because the Marine Corps had no JAG, it would look to the Navy's JAG for certification. This removed general court judges from the local chain of command and fitness report chain, and ensured their independence and freedom from local command influence. For the first time an accused was allowed to opt for trial by military judge alone. This corresponded to the civilian bench trial.

The most significant change in the 1968 act required that a lawyer represent every accused at special courts-martial, whether or not a bad conduct discharge was a possibility (unless lawyers were unavailable because of military conditions, an unlikely situation). Senator Ervin said of prior provisions allowing nonlawyer defense counsels, "it is sheer fantasy, in my view, to contend that a veterinary officer or a transportation officer who has read a few pages of the Uniform Code . . . can adequately represent a defendant in [a court-martial]." Constitutional and criminal law had changed dramatically since adoption of the 1950 UCMJ. Landmark opinions such as *Miranda v. Arizona*, *Mapp v. Ohio*, and *Gideon v. Wainwright*, had been issued, and all of those decisions were binding on military courts as well as civilian.* Given the rights now available to suspects, evidentiary limitations, and the increasingly complex nature of a special court-martial, the Senator's view was not unreasonable. Nevertheless, the Navy resisted the counsel provision of the act, citing the difficulty of securing lawyers in sufficient numbers and problems in convening courts at sea. The Air Force held that it was already capable of providing lawyers in every special court-martial, and the Army, by regulation, did not then permit special courts to impose bad conduct discharges.[12]

Finally, the new amendments to the UCMJ provided that Marine Corps lawyers could be designated "judge advocates" and allowed designation of the senior lawyer of a command as "staff judge advocate," rather than staff legal officer.[13] Authorized by a Marine Corps order, both changes in designation became the practice as soon as the act was passed and before it became effective.[14]

With the act, instead of a battalion commander telling one of his officers acting as trial counsel that he, the commander, expected a certain case to be tried within a certain period, the commander had a judge advocate defense counsel to work with (or contend with). On the other hand, he also had a judge advocate trial counsel assigned to prosecute his cases. But neither defense nor trial counsels were in the battalion commander's chain of command. Years later, General Paul X. Kelley, 28th Commandant of the Marine Corps, said of the Military Justice Act:

> Under the old system there's a great psychology in having the commander say, "I award you a special court-martial," and for that individual to know that the commander is going to follow that special court-martial through . . . . This was a great change, and a culture shock for [commanders], because no longer were you the man in charge.[15]

From the judge advocate's perspective, his skills were

*The warning of rights required by Miranda (384 U.S.436; 86 S.Ct.1602 [1966]) are well known. Mapp (367 U.S.643; 81 S.Ct.1684 [1961]) forbade admission of improperly seized evidence. Gideon (372 U.S.335; 83 S.Ct.792 [1963]) settled the right of indigents to appointed counsel in noncapital cases.

simply extended into new arenas. As Captain John S. Papa, a Force Logistic Command (FLC) lawyer, noted:

> A battalion commander sees a lawyer come in and say, "Sir, this is a good pretrial agreement, because this is all I can get from a court," and in fact that's all he does get; or he comes in and says, "This is a bad search and seizure," and . . . in fact the court dismisses the charge. Slowly, a confidence is built up. The lawyer begins to be respected for what he can do for the command.[16]

Captain Papa added that "we lawyers had a growing experience, also, when we began working at the battalion level. We're beginning to learn a little bit more about our bastard system . . . being a disciplinary as well as a legal system."[17]

A critic, after reviewing the Military Justice Act of 1968, conceded that "it extended substantially new due process rights to servicemen, some of them more favorable than were then provided in civilian courts, and its changes in court-martial procedures, especially the general court-martial, considerably replaced the old disciplinary flavor with a judicial one."[18] President Lyndon B. Johnson, upon signing the act into law, noted: "We have always prided ourselves on giving our men and women in uniform excellent medical service, superb training, the best equipment. Now, with this, we're going to give them first-class legal service as well."[19] All of the act's improvements were needed to cope with the disciplinary crisis building in the Armed Forces and in Vietnam.

Contrary to the Navy JAG's fears, there were enough judge advocates to meet the expanded requirement for lawyers. Marine Brigadier General Duane L. Faw recalled that "my problems were with retention . . . not with getting bodies. The [new act] didn't make that much difference."[20]

When the act went into effect on 1 August, law officers—those senior Marine Corps lawyers assigned to Navy and Marine Corps Judicial Activity offices—changed titles and became general court-martial military judges. FLC conducted seminars on the new act for both judge advocates and commanders.[21] The newly mandated special court-martial military judges were drawn from the more experienced trial and defense counsels in each staff judge advocate's (SJA) office. Of necessity, they were predominantly captains and almost exclusively Reserve officers who were on their first tours of duty as lawyers and Marines. III MAF sent as many of them as possible to Subic Bay Naval Base in the Philippines for a Navy-conducted, 10-day military judges' course.[22] The requirement for special court-martial military judges strained legal office manpower, because the newly created posts were filled from the complement of judge advocates then present without compensating replacement lawyers.[23]

At 0730 on 1 August 1969 five 1st Marine Division judge advocates were sworn in by the division's commanding general as special court-martial military judges. Because of time zone differences, it was still 31 July in the United States. Promptly at 0800, Vietnam time, as planned by the division's lawyers, Lieutenant Colonel William R. Eleazer opened the first court-martial anywhere to employ the 1968 act's new military judge provision.[24]

Marijuana: Persons of Ill Repute

Nearly half the cases tried in Vietnam in 1969 involved possession or use of marijuana. MACV's 1969 Command History reported:

> Marijuana was sold by taxi drivers, prostitutes, street urchins, and other persons of ill repute. The enforcement effort directed toward the elimination of the source of marijuana was hampered by the lack of . . . interest by Government of Vietnam authorities.[25]

Marijuana cost ten cents a stick at virtually any store or traffic light.[26] (A "stick" of marijuana, as the name implied, was a slim wooden stick, around which were wound strands of the marijuana leaf.) In a postwar interview, Army General William C. Westmoreland was asked about accounts of Vietnam drug use and fraggings. He replied: "I was aghast when they had soldiers killing other soldiers, smoking pot in their bunker. It didn't happen . . . . If it happened, it was very exceptional."[27] But judge advocates knew that those offenses were all too unexceptional.

In 1969 Marine Corps leaders faced an epidemic of marijuana use and the breakdown of authority that accompanied it. Major Ives W. Neely, commanding officer of Maintenance Company, Force Logistic Supply Group-Bravo, said with resignation:

> In the company at least 70 to 80 percent—a very high number of people—were using marijuana . . . . People who were pushing the marijuana had put fear into the personnel not using it, to the point that no one down in the troops' area, from private through sergeant, would put a man on report, even when he knew he was smoking marijuana, because of the strong union of marijuana smokers.

Reflecting the pernicious effect that marijuana had on overall discipline, Major Neely continued:

> They would catch a new man as he reported into the unit and tell him that if he was going to buy marijuana he would

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

At 0730 on 1 August 1969, the day the Military Justice Act became effective, newly appointed special court-martial military judges took their oaths at the 1st Marine Division Headquarters in Da Nang from Assistant Division Commander, BGen Samuel Jaskilka. The new judges were, from left, Capt Martin G. McGuinn, Jr.; Capt George G. Bashian, Jr.; LtCol James P. King; LtCol William R. Eleazer; and Capt Arthur W. Tifford.

> buy it from them, and if anyone told, turned in any of their names, there were ways to do these people in. Usually it was with the threat of a hand grenade.[28]

Marijuana detecting dogs first appeared in III MAF in 1968. Kept by the Military Police Battalion Dog Platoon near the III MAF brig, they were invaluable in detecting concealed marijuana. They were especially effective in stemming entry of the substance into Vietnam by Marines returning from R & R ports. Colonel Duane Faw, formerly the III MAF assistant chief of staff and headquarters staff legal officer, recalled:

> Before disembarking the [aircraft], passengers were told that the provost marshal was beyond the end of the ramp with a marijuana sniffing dog, and anyone detected with marijuana . . . would be prosecuted. They could avoid punishment only one way: at the end of the ramp was an "amnesty barrel." . . . A substantial number of returning service personnel placed something in the amnesty barrel.[29]

A new Marine drug rehabilitation center located at Cua Viet was available to drug users from nearby infantry battalions.[30] Still, marijuana use increased. Its burden on the military justice system was reflected in the changing approach to penalties. In 1968, FLC sent cases involving use of marijuana to general courts-martial; by 1969 such cases were tried at special courts and, for first offenders, at summary courts.[31] Only dealers and those involved with hard drugs faced general courts-martial.*[32] Nor was drug abuse any longer restricted to rear area units.

As Lieutenant Colonel Carl E. Buchmann, FLC's deputy SJA, observed: "I don't know what the solution is. It's a problem that's going to be with us for a long time, the way the climate back in the States appears at the moment . . . . I don't know what the hell we're going to do."[33]

Racial Conflict: Black, White, and Green

"Tensions of Black Power Reach Troops in Vietnam," a *New York Times* headline read. "There is no longer any doubt that the black-power issue and its tensions have come to the United States troops in Vietnam . . . . The racial problem appears to be caused mainly by a hard core of militants of both races, estimated at 1 percent or less."[34]

Approximately 41,000 black Marines served in Viet-

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*A not-unusual case was *U.S. v Pvt Lester E. Allison*, of 1st Force Service Regiment. On 25 October 1969 he was convicted by general court-martial of possession of 1,400 marijuana cigarettes. He was sentenced to a bad conduct discharge, confinement at hard labor for 18 months, and forfeiture of all pay and allowances. (III MAF results of trial by general court-martial ltr, dtd 3Nov69. Federal Records Center folder, Marines and Military Law in Vietnam file, MCHC.)

nam, many in demanding combat leadership roles. But a significant number, victims of prejudice in civilian life and suspicious of the military system, were quick to find or infer discrimination in the Marine Corps.[35]

The first black Marine was not enlisted until 1942, and then only in compliance with an Executive Order directing an end to racial discrimination in the Armed Forces. Initially, blacks were restricted to all-black units commanded by white officers. The Korean War finally brought integration to the services. At the end of that conflict 15,000 blacks were in Marine Corps ranks in every military occupational specialty. (Not until March 1954, however, did Marine Corps enlistments for "Steward Duty Only" end.) By the 1950s official policy required an end to segregation in the Marine Corps. But the actions and attitudes of a few white Marines who were products of a lifetime of segregation, the hardcore one percent, ran counter to that policy and often created situations ending in disciplinary proceedings.[36]

In Vietnam in mid-1969 the commanding general of the 3d Marine Division, Major General William K. Jones, distributed a letter to his commanders, addressed, "Confidential, Addressee Eyes Only":

> In view of the apparent lack of awareness of some officers and staff non-commissioned officers of the basic human rights of all Marines, I will amplify that point . . . . Every Marine, regardless of race, color, creed, or rank has certain basic human rights. These are the right to fair and equal treatment and the right to respect for his individual dignity. [Those rights] deserve more than lip-service; [they] must be vigorously observed.[37]

In rear areas blacks and whites mingled on the job but usually re-segregated themselves when off duty. Many liberty areas near Marine Corps bases had *de facto* white and black sections, which members of the other race entered at their peril.[38]

In April 1969 Second Lieutenant James H. Webb, Jr., future Secretary of the Navy, commanded a rifle platoon in the 1st Battalion, 5th Marines. While his company was in the regimental rear at An Hoa, one of his men reported the theft of his .45 caliber pistol and his belief that it was concealed in the "Black Shack." Lieutenant Webb confirmed that the pistol had indeed been stolen by the occupants of the Black Shack, apparently so it could be sold. As Webb recounted: "There were four individuals, all of them out of the inner city, who were awaiting courts-martial for violent acts, who literally would just as soon slit your throat as look at you. They had forcibly taken over half

Department of Defense Photo (USMC) 122-1092-01-73

LtCol Carl E. Buchmann was FLC's Deputy SJA in 1969-70. He is shown in a 1973 photograph as a colonel. He said of marijuana use in Vietnam: "It's a problem that's going to be with us for a long time."

of a tent, a space normally reserved for a dozen Marines." Lieutenant Webb confirmed that the four had the pistol and were going to try to sell it. Webb continued:

> I walked over to the black shack. There was a sign up above the door—I'm going to quote it exactly: "Chuck dudes, stay the f--- out—this means you!" . . . I walked into the tent. [A poster of] Bobby Seale was staring at me from one wall. A sign, "Kill the Beast," was up on another wall. This is inside a Marine compound in Vietnam.

Although Lieutenant Webb faced down the four and ordered them to empty their packs and other equipment onto their cots he did not locate the pistol.[39] The incident illustrates the tenor of race relations in the combat units during the period.

Bernard C. Nalty, in his history of blacks in the Armed Forces, notes:

> Like the Army, the Marine Corps had been experiencing occasional racial clashes since 1965, the year of the Watts riot and the Americanization of the Vietnam War . . . . Senior Marine Corps officers saw no emerging pattern and treated the incidents as unrelated lapses in discipline. There are no black Marines and no white Marines, only green Ma-

rines (a reference to the color of the uniform), ran the slogan of the mid 1960s.[40]

Nalty went on to note that by 1969 some blacks were "streetwise advocates of black power who would take offense at injustices, real or imagined, and lash out violently."[41]

"Dapping," passing power, afros, and black power symbols all took on special significance. Dapping was the stylized ritual some black servicemen employed upon meeting, involving a series of mirrored, uniform motions beginning with a variation of a handshake. Dapping was akin to a secret fraternity grip raised to a new level, representing a form of cultural identification and a solidarity—a kind of racial salute. "Passing power" was essentially dapping with an intent to represent racial assertiveness and aggressiveness. Afros, the haircuts favored by some young blacks, were rarely in compliance with Marine Corps grooming regulations. Many white NCOs and officers viewed Afros, dapping, and passing power as threats to authority and challenges to leadership. Confrontations over these things often resulted in court-martial charges of disobedience, disrespect, assault, and resisting apprehension, the almost visible progression of offenses discernable from a charge sheet. Judge advocates referred to that progression as the bursting radius of a hot Marine.

2dLt James H. Webb, Jr., was a platoon commander in Company D, 1st Battalion, 5th Marines. He was awarded the Navy Cross, the Silver Star, and two Bronze Star Medals, as well as two Purple Hearts. In 1987 he became Secretary of the Navy. While in An Hoa, Vietnam, he had to deal with racial problems.

Marine Corps Historical Collection

On 2 September the Commandant of the Marine Corps, General Leonard F. Chapman, Jr., issued a directive to all Marines (called an ALMAR) regarding race relations and racial violence. He directed commanders to make "positive efforts to eradicate every trace of discrimination, whether intentional or not." He further instructed them to permit "Afro/Natural" haircuts, provided they conformed with haircut regulations. He declared that "individual signs between groups and individuals will be accepted for what they are—gestures of recognition and unity," but, he continued, "they are grounds for disciplinary action if executed . . . in a manner suggesting direct defiance of duly constituted authority."[42] While the Commandant's intent was clear, imprecise wording of the directive provided grist for many a defense counsel's argument.

In a letter to Headquarters Marine Corps, the SJA of the 1st Marine Division, Colonel Robert M. Lucy, noted the looseness of the directive's language, saying:

> We have found it to be in need of clarification. The "Afro haircut" is not well understood . . . . Our Division Sergeant Major says the NCOs do not know how to enforce it. Often when admonished to get a haircut, Negro Marines will pull out a battered copy of the ALMAR and wave it at the NCO involved.[43]

In a remarkable message, the commanding general of III MAF, Lieutenant General Herman Nickerson, Jr., told the commanding general of FMFPac, Lieutenant General Henry W. Buse, Jr., that "blacks whom I am dealing with out here feel that the Commandant owes them an explanation concerning ALMAR 65. Part of this explanation would be a description of what actually is allowable for an Afro-American haircut."[44] But other than courtroom interpretations, clarification was not to be had.

Colonel Lucy advised the division commanding general, "militancy among Negro Marines is definitely on the increase. It cuts across almost every unit in the Division."[45] Indeed, racial concerns were becoming a major command preoccupation. A system of I Corps Tactical Zone Watch Committees was established to "monitor and recommend appropriate action on racial tensions and incidents." The Watch Committees' reports recapitulated courts-martial and disciplinary actions resulting from racial incidents.[46] Weekly Subversive Activity Reports included "assessment of the

Department of Defense Photo (USMC) A193460

LtGen Herman Nickerson, Jr., III MAF commanding general, right, wanted the Commandant, Gen Leonard F. Chapman, Jr., center, to explain his message on racial matters. In this 1970 picture the Commandant presents LtGen Hoang Xuan Lam the Legion of Merit.

current threat to the command from subversive/racial standpoint."[47] Still, serious racial incidents increased in number. Between April and June 1969 there was an average of one "large scale riot," per month, according to the Watch Committee's report. Racially motivated fraggings, armed confrontations, and even intramural small-arms firefights were cases on the dockets of III MAF judge advocates.[48]

Only three black Marine Corps judge advocates were assigned to Vietnam during the war. All three arrived in Da Nang in 1969. Captain Jacob R. Henderson, Jr., was assigned to FLC. Captains Cecil R. "Butch" Forster, Jr., and Robert C. Williams were both 1st Marine Division judge advocates.

Captain Williams proved an abrasive but effective defense counsel, and was often requested by black defendants who may have heard of the Malcolm X and black power posters in his quarters. Brigadier General James P. King, a former Director of the Judge Advocate Division, recalled that "Williams had quite a few rough edges . . . . He was not the easiest to get along with."[49] Among the other 1st Division attorneys, he was referred to as "X," or "Brother X," an appellation intended, and accepted, in good nature. Many lawyers actually thought that his middle initial was "X," it was so commonly applied. Captain Stephen C. Berg recalled that Captain Williams was effectively unorthodox in the courtroom and always ready for a legal battle.[50]

Colonel Robert M. Lucy had requested that Captain Forster be assigned to his 1st Marine Division office, saying "[he] would be very helpful, I believe, with any future racial problems."[51] Captain Forster did prove to be an exceptionally able counsel, defending 128 Marines in nine months.[52] He was articulate, well-liked, and often referred to by Captain Williams as "Oreo"— black on the outside, white on the inside. The two were not close.[53]

Major Charles A. Cushman recalled of Captain Henderson, the third black judge advocate:

Jake Henderson was an ethical and competent judge advocate who never compromised his professional ethics or principles for the benefit of a black accused. You must also bear in mind that the NAACP and other civil rights groups were distressed by the small number of black attorneys in uniform and with the lack of confidence young blacks had in the military justice system.[54]

The 1969 general officers' symposium at Headquarters Marine Corps concluded that "we do have a dissent/racial problem in the Marine Corps. We should not overreact to this problem, and the Corps should rely on fair, impartial leadership" to resolve it.[55] The commanding general of the 1st Marine Division, Major General Ormond R. Simpson, in the combat zone, agreed that racial conflict was the 1st Division's number one problem.[56] While there were only green Marines in the eyes of some, Marine Corps judge advocates knew better.

Administrative Discharge: The Right Fix

As the phrase implies, an administrative discharge is the mechanism by which a Service member is discharged by administrative process. An administrative discharge cannot be given by a court-martial. Also, an administrative discharge may be issued only after due process — notice, representation by counsel, an opportunity to be heard, and cross-examination of witnesses. An "admin" discharge hearing, conducted before a board of at least three officers, could result in a discharge characterized as undesirable, unsuitable, general, or honorable, or could result in retention, although that was seldom the outcome. If the Marine under consideration requested, he was provided judge advocate representation. The government might or might not be represented by a lawyer. The board heard evidence, deliberated, and made a recommendation to be acted upon by the commanding general, who had authority to administratively discharge individuals. If he disagreed with the board's recommendation, he could upgrade the discharge, that is, elevate it to a more desirable type, or even retain the Marine. He could not downgrade the discharge recommended.

From the Marine Corps' viewpoint the significant advantage to an admin discharge was that, unlike a court-martial, an admin could be processed in a matter of one or two weeks — days, if walked through the administrative processing stages. Unlike a court, however, no punishment other than a discharge of bad character could be imposed by an admin board; it was

Three black Marine Corps lawyers served in Vietnam. Capt Robert C. Williams, fourth from right, received his certification as a special court-martial military judge from the commanding general of the 1st Marine Division in February 1970, at Da Nang. From left, Col Robert M. Lucy, the Division SJA, observing; LtCol James P. King, who had taken his judge's oath five months before; Capt Mark L. Haiman; Capt Daniel H. LeGear, Jr.; Williams; Capt Adrian R. King; Capt Gary E. Bushell; and MajGen Edwin B. Wheeler.

Photo courtesy of Col Robert J. Blum, USMC (Ret.)

a simple question of the board reviewing the case and deciding whether the individual should be retained in the Corps, or discharged. If discharged, the additional question was the type of discharge. Those were the only issues. Usually, an act that could result in a court-martial could be the basis for an administrative discharge proceeding. Frequent involvement with authorities, character and behavior disorder (emotional unsuitability), and conviction of a felony by civilian courts were some of the other grounds for admin discharge.

Through his court-martial counsel, an accused Marine could request an admin discharge in lieu of trial, as well. If granted, the accused would avoid court-martial and its prospect of conviction and confinement. This was often referred to as a "good of the service" discharge, or "G.O.S.," after its description in the *Administrative Discharge Manual.* The price for an admin discharge in lieu of trial, a "GOS," was admission of culpability for the offense charged, and an undesirable discharge was automatic. If the request for discharge was denied, no reference to the accused's admission of guilt could be made in a subsequent court-martial.

The military justice system was becoming so overburdened that the initial decision in many pending special courts was whether a Marine should go to an admin board or to a court. Was the goal simply to be rid of the man as expeditiously as possible, without concern for punishment? Of course, a board recommendation for retention was always a possibility. That required the command to take the man back.

The commanding general's considerations regarding approval or disapproval of a board-recommended discharge included Marine Corps-wide personnel policies. Admin discharges had a cumulative effect on Marine Corps strength—on the number of Marines on active duty. That, in turn, was tied to the Corps' budget; when strength dropped below certain levels, Congressionally imposed budget restrictions took effect. So, depending on Corps-wide manpower levels, commanding generals could be constrained to disapprove a recommendation for discharge for reasons unrelated to the conduct of the Marine involved.

Previously, administrative discharges had been sparingly employed. But rising caseloads and the tide of marijuana were combining to compel consideration of administrative discharges as a safety valve allowing quick separation of problem Marines. In late 1968, and even more so in 1969, admin discharges were liberally employed. As Captain John Papa noted: "The Marine Corps has to cut out, [in] the least expensive way . . . those persons who are non-rehabilitatable, and those persons who just can't hack it, and the right route is the administrative route."[57] The 3d Marine Division's assistant division commander, Brigadier General Regan Fuller, was more direct when he remarked that "we're getting rid of these bums who shouldn't have been in the Marine Corps in the first place!"[58] General Fuller went on to detail the "jump summary"—a quick summary court-martial conducted in the field, that primed the record of a habitual offender for an undesirable discharge, once he came before an administrative discharge board. In 1969 few commanders were inclined to question the ethical issue of the jump summary's fairness.

An example of the admin discharge process, although hardly typical, was the case of Corporal Leo O. Testman, Force Reconnaissance Company, 3d Marine Division.[59] Corporal Testman, with 10 months in Vietnam, had been meritoriously promoted to his grade and had been wounded in action. He was highly regarded in his unit as a Marine and a combat leader. He was also a deserter from the U.S. Air Force, with a prior general court-martial conviction. A routine FBI record check uncovered his past. Upon being notified, his unit had no choice but to forward the fraudulent enlistment charge to an admin discharge board, although Force Reconnaissance Company made it known that it would like Testman back. His platoon commander, First Lieutenant Ronald W. McLean, visited the office of the Division SJA and provided a statement to Corporal Testman's counsel, Captain Clarke C. Barnes.

Sadly, by the date of the hearing, late July 1969, Lieutenant McLean, the stepson of actor Jimmy Stewart, and Testman's most persuasive witness, had been killed in action. Still, despite Corporal Testman's Air Force record, the board recommended Testman's retention in the Marine Corps. The commanding general differed with the board's recommendation and advised the Commandant of the Marine Corps of the case. The Commandant disagreed with the division commander. In a message to the Air Force, the Commandant noted Testman's wounding and two promotions while in Vietnam. He concluded: "Based on the above, it is recommended Testman be discharged from the Air Force and allowed to continue serving his country in the Marine Corps."[60] The Air Force acquiesced. Corporal Testman was retained in the Marine Corps,

returned to his unit, and went on to be awarded the Navy Achievement Medal for combat valor.[61]

Few administrative discharge cases involved Marines like Corporal Testman or outcomes similar to his. During the last six months of 1968, 2,535 enlisted Marines and 14 officers were administratively discharged from the Marine Corps worldwide.[62] During 1969 in the 1st Marine Division alone 121 undesirable and unsuitable administrative discharges were ordered.[63] Worse was to come in following years.

Fragging: Killers In Our Midst

Even without official statistics to establish the number of Marine Corps fragging incidents in Vietnam, they clearly increased sharply in 1969.* In the U.S. Army, fraggings escalated from 126 incidents in 1969, to 271 in 1970, and 333 in 1971.[64]

Major Charles A. Cushman, an FLC judge advocate, said about this type of assault: "They may or may not have known the victim or even had a grudge against him. Their only thought was to 'Get the lifer and blow him away.' "[65] Colonel John R. DeBarr, general court-martial military judge, said: "It's just a way for them to lash out against authority . . . . These boys are real criminals, and there's no way you can protect yourself against that individual . . . . It has to be stamped out!" Indiscriminate assaults were becoming frequent, but evidence admissible at court-martial was difficult to obtain. Colonel DeBarr, in a debriefing following completion of his tour of duty, said of the homicide cases awaiting trial in Vietnam: "Most of them are fragging cases . . . and don't be disappointed in the results. I'll be surprised if you get convictions. These are difficult cases . . . . To prepare such a case takes a lot of effort, a lot of time, and a lot of money." He went on to note that usually there were witnesses to fragging assaults, or those who knew who had committed them, but they were intimidated into silence. He urged that those witnesses had to be assured of protection and suggested they be removed from Vietnam until they testified, and then, after testifying, be transferred to a command in the United States.[66]

*Department of Defense figures specify that no Marine in Vietnam died of a nonhostile gunshot, grenade, fragmentation wound, or "misadventure." Twenty-two Marines are said to have died of "intentional homicide." Those figures are clearly, and unaccountably, incomplete. It is possible that deaths by fragging are considered in that category, although that would reflect a remarkably low number of deaths and would have to ignore the more logical categories under which such deaths should be listed. (DOD, *U.S. Casualties in Southeast Asia: Statistics as of April 30, 1985* [Washington: 1985], p. 5.)

Department of Defense Photo (USMC) A413516

MajGen William K. Jones was commanding general of the 3d Marine Division from April 1969 to April 1970. He took aggressive and imaginative action to meet the fragging scourge. "It is deemed of paramount importance to find and punish those responsible."

The 3d Marine Division, commanded by Major General William K. Jones, suffered 15 fragging assaults in the first six months of 1969. A suspect was apprehended in only one case. Moreover, the usual minimizing statement—that problems were confined to rear-echelon units, and that combat-committed Marines were too busy fighting the enemy to engage in such acts—was no longer true. Only five of the 15 3d Division incidents were committed in rear areas.

General Jones took energetic and imaginative steps to end fraggings in his division, saying: "It is deemed of paramount importance to find and punish those responsible for these senseless acts of violence, not only for the crimes already committed, but because continued undetection will almost certainly lead to continued frequency." He directed that access to hand grenades be restricted where feasible, that informants be relied upon, and that they be protected by transfers to other commands or to units in the United

States. He directed his commanders to be alert to groups of malcontents and to disperse them by transfers to other units. Administrative discharge of "hardcore troublemakers" was emphasized, even if it meant giving them honorable discharges. General Jones emphasized that "commanding officers must abandon the concept that the only way a 'bad' Marine should leave the service is with a bad discharge," because the lag time involved in processing courts-martial or undesirable discharges only allowed the troublemaker opportunity to contaminate others. An administrative honorable or general discharge, on the other hand, could be processed quickly and easily and without appeal. All 3d Division clubs were ordered closed at 2130 and a 2200 curfew was instituted in rear areas. Military Police Company sought volunteers from Marines who had clean records and who had already served six months in an infantry battalion. MP Company was carried overstrength. An extensive division intramural athletic program was instituted, as well.

While aggressively taking action directed towards malcontents, General Jones reminded his commanders:

> In any dispersal of a group or association, particularly where the membership of that group is based upon race, the utmost degree of common sense, tact, and discretion is required. Under the First Amendment . . . every man is guaranteed the right of peaceful assembly and freedom of speech. While these rights are not absolute, they are still to be held in the highest respect.[67]

Finally, by division order, General Jones outlined procedures to be followed after any act of violence, such as a racial incident or fragging assault: The area where the act occurred was immediately isolated by MP teams who controlled movement into or out of the area. Next, a roll call was held to determine who was missing and who was present who should not be. Concurrently, all transient movement (R & R departures, temporary additional duty departures, even permanent change of station departures to the United States) was suspended for the period of the investigation. All sergeants and below were ordered to their tents or SEAhuts for as long as the investigation lasted. Sandwiches were delivered from the mess hall to the men's quarters, as no movement was permitted until the investigation concluded. After consultation with the SJA, quarters of all suspects were searched by a team headed by an officer. Each Marine in the area of isolation was escorted, one-at-a-time, to an interrogation site for questioning and was reminded of the policy to protect those providing information. After questioning, suspects were isolated and not returned to their quarters.[68]

Fragging assaults in the 3d Marine Division declined, but did not end. Recognizing the value of aggressive action in such cases, other commands adopted the 3d Marine Division's blueprint for the apprehension of suspects. Nevertheless, fragging assaults continued as long as Marines were in Vietnam.

From a Lawyer's Case File: Murder of a Company Commander

The commanding general of the 3d Marine Division, Major General Raymond G. Davis, remembered First Lieutenant Robert T. "Tim" Rohweller: "[He was] a very fine lieutenant—in fact, at one time he was my son's company commander—who was killed by a couple of Marines . . . Marines who were avoiding their duty and had been caught at it."[69]

First Lieutenant Tim Rohweller commanded Company K, 3d Battalion, 9th Marines. He was a "mustang," an officer with prior enlisted service, and had completed a previous Vietnam tour of duty as a sergeant in a reconnaissance battalion. Now, according to his battalion commander, Lieutenant Colonel Elliott R. Laine, Jr., he was one of the best company commanders in the battalion and was widely recognized as a superior leader.[70]

On 20 April 1969, shortly after the conclusion of Operation Dewey Canyon, Lieutenant Rohweller left his company's forward position for Quang Tri Combat Base to take care of company matters and to check on the "sick, lame, and lazy" in the rear. In the course of the day he confronted several Marines who thought to remain in Quang Tri, until forcefully told otherwise by Lieutenant Rohweller. The rear area Marines included Privates Reginald F. Smith and Jimmie Dudley, and Privates First Class Donald R. Egan and David Napier. All four were billeted in the transient hooch, a few yards from the company office. Throughout the day and into the evening the four, Smith particularly, nursed imagined wrongs. Their anger gradually escalated into a determination that the focus of their discontent, Lieutenant Rohweller, was responsible not only for their problems, but for the imagined unnecessary death of other Marines during combat operations, as well. Smith formed a plan to murder the lieutenant.[71]

Lieutenant Rohweller was aware of the danger. The company administrative chief later testified that in the early evening the lieutenant entered the company office and retrieved his pistol, chambered a round, and

Department of Defense Photo (USMC) A192824

MajGen Raymond G. Davis, right, was Commanding General, 3d Marine Division. Here, assisted by Col Robert H. Barrow, 9th Marines commander, he promotes his son, Miles Davis, to first lieutenant. Lt Davis was assigned to 1stLt Robert T. Rohweller's company.

stuck the .45 automatic, cocked and locked, into the waistband of his utility trousers. Later at the officers' club several officers noticed the pistol, but said nothing.

Late that night, Smith, Napier, Egan, and Dudley, joined by Private First Class Bobby R. Greenwood and Lance Corporal Hercules E. Brooker, sat before the transient hooch smoking marijuana and discussed Smith's plan. According to Brooker's later trial testimony, Smith said, "Lieutenant Rohweller and Lieutenant Newsome are in the rear, and when those m----------s go to the field, they're taking every-f---ing-body with them." Smith said of Lieutenant Rohweller that he, Smith, was "going to 'do' that m--------- as soon as he crashes" and discussed his plan to frag the lieutenant. Dudley told Smith that he was crazy and left the group.

At 0210 on 21 April those in the transient hooch were awakened by an explosion. An M26 fragmentation grenade had detonated in the neighboring company office directly under the cot upon which Lieutenant Rohweller slept and inflicted shrapnel wounds of the head, chest, and abdomen. As the battalion surgeon worked over the lieutenant, the first sergeant quickly held a company formation and determined that one man, Egan, was unaccounted for. Suspicion immediately centered on him and his companions.

While standing in the formation, Smith held his hand up to Dudley. Dudley testified that on Smith's index finger was a metal ring, the pin from a hand grenade. "I did that m--------- ," Smith confided. "He won't f--- with nobody else no more."

Transported to the hospital ship *Repose*, Lieutenant Rohweller died at 1120 that morning. Back at Quang Tri members of Company K were still being questioned. When word was passed that the lieutenant had died, Lance Corporal Hercules Brooker made a quick decision. As he testified in Napier's trial, "I grabbed my tape recorder and went into the company office and saw a lieutenant and just started blurting out names. I told him Smith threw the frag and that Napier held the door; also about Egan and Dudley."

Given the strong case against him, Private Smith and his counsel concluded that a guilty plea was unavoidable. Before Smith went to trial, however, his alleged accessory to murder, Napier, was first tried for having held the door open while Smith rolled the

grenade into the hooch. The evidence against Napier appeared as overwhelming as that against Smith.

The general court-martial of Private First Class Napier convened on 11 August. He was 19 years old, a ninth grade dropout. Charged with conspiracy to commit murder and premeditated murder, he pleaded not guilty. His defense counsel was Captain Clark A. Halderson. The trial counsel and assistant trial counsel were Lieutenant Robert D. Zsalman, JAGC, U.S. Navy, and Captain Edward L. Murphy, respectively. The military judge was Lieutenant Colonel Henry "Hank" Hoppe.

The government's principal evidence against Napier was the testimony of Lance Corporal Brooker. He swore that immediately after the blast he had seen Smith and Napier run back into the transient hooch, and that later Napier had told him he had held the door open while Smith rolled the grenade into the office hooch.

Napier testified in his own behalf, swearing he had been asleep when the lieutenant had been assaulted. The defense vigorously attacked the credibility of Brooker. Brooker's platoon commander testified that Brooker "tends to fabricate fantasies" and he would believe Napier over Brooker. His platoon sergeant swore, "Brooker has the worst character for truth and veracity I have ever known." Another lance corporal testified: "I wouldn't trust him as far as I could throw him." In another vein, a corporal testified that, when the grenade went off, he had leapt from his rack and stepped on the accused, who, rather than holding any doors open, was asleep on the floor of the transient hooch. Another witness, Lance Corporal Wilkinson, testified almost in passing that Private First Class Greenwood had told him that he, Greenwood, had assisted in the killing.

In retrospect, spotlighting snippets of testimony and ignoring days of conflicting evidence, Napier's inno-

1stLt Robert T. "Tim" Rohweller, kneeling right, shown two weeks before his murder by fragging. The officers of the 3d Battalion, 9th Marines pose outside the officers' mess at Vandegrift Combat Base on 5 April 1969. The occasion was a farewell dinner for the regimental commander, Col Robert H. Barrow, standing second from right. 1stLt Rohweller's battalion commander was LtCol Elliott R. Laine, standing third from right. Others are Capt Thomas F. Hinkle, standing far right, and Capt Joe A. Arroyo, kneeling left.

Photo courtesy of Col Elliott R. Laine, USMC (Ret.)

cence seemed apparent. But at the moment of decision, after lengthy contradictory testimony, unresolved discrepancies, and emotional arguments, the members found Napier guilty of conspiracy to commit murder but not guilty of the murder itself. They sentenced him to reduction to private, loss of all pay and allowances, confinement at hard labor for 20 years, and a dishonorable discharge.

After Napier's conviction, but before Smith's trial, events took an unusual turn. Dudley, who was originally charged with the murder but not tried because of his withdrawal from the conspiracy, revealed that, while he had been in pretrial confinement with Smith, Smith repeatedly told him that it was Greenwood, not Napier, who had held the door open when he tossed the grenade under the lieutenant's cot.

Lt Robert D. Zsalman, JAGC, USN, was a 3d Marine Division trial counsel. After learning of new evidence he joined the defense in seeking to overturn Napier's conviction of the murder of 1stLt Tim Rohweller.
Photo courtesy of Col Clarke C. Barnes, USMCR

Wilkinson, the witness from the Napier court, reaffirmed that Greenwood had admitted to him that he, Greenwood, had assisted Smith in the killing. Although awaiting trial himself, Smith made a sworn statement that Napier had nothing to do with the murder, and that it was Greenwood who had held the door for him. A polygraph examination indicated that Napier was not deceptive in his denial of guilt.

At his separate trial Private Smith pleaded guilty to premeditated murder and conspiracy to murder. With a record of two prior nonjudicial punishments in Vietnam for avoiding service in the field, Smith was sentenced to life imprisonment, later reduced to 40 years confinement.* Because he pleaded guilty, there is no detailed testimony or courtroom record of the details of the killing, although Smith repeated that it was Greenwood, not Napier, who had held the door open for him when he rolled the grenade into the hooch.

Before it was known that Smith would plead guilty, Egan had been granted immunity in return for his testimony in the Smith court-martial. But before Smith's trial, Egan was diagnosed as a schizoid personality and he was administratively discharged from the Marine Corps.[72]

What of Brooker's damning testimony against Napier? Under post-trial questioning he admitted he had been "guessing" when he identified Napier, because he had figured that Napier was guilty, and he thought that was what the government wanted him to say. Captain Clarke C. Barnes, a 3d Marine Division defense counsel, later wrote that "Brooker was a first class prevaricator—his lies kept him embroiled in the investigation and out of 'the bush.' I'm convinced that was his primary motivation."[73] After Napier's trial Brooker returned to the hospital where he was recovering from a self-administered injection of saliva into his knee, which rendered him unfit for combat duty. He received a medical discharge.

Upon learning of Greenwood's involvement, Napi-

*In May 1971, Smith was transferred from the Naval Disciplinary Command, Portsmouth, New Hampshire, to a federal prison. He died on 25 July 1982, while still in confinement, after having served almost 13 years. No record has been located that shows the cause of death. (NC & PB ltr to author, dtd 31Aug88; and Reginald F. Smith service record; both in war crimes folder, Marines and Military Law in Vietnam file, MCHC.)

er's counsel made a motion for a new trial based upon newly discovered evidence. After investigation of the allegations contained in the motion, the findings of guilty and the sentence of Napier's court were disapproved, and the charges against him were dismissed. He was released after having served two and a half months in confinement, returned to his former grade, given back pay and honorably discharged, because his enlistment had expired.

A year and three months after Lieutenant Rohweller's murder, Lance Corporal Bobby R. Greenwood's general court-martial convened at Camp Pendleton on 17 July 1970. Represented by civilian, as well as military counsel, he pleaded not guilty to conspiracy, murder, and perjury. The case was long and hard-fought, with an extraordinary number of defense motions to dismiss charges and for mistrial.

Private Smith was brought from confinement to testify that Greenwood had held the door for him. Wilkinson repeated Greenwood's admissions that he had been involved in the murder. Napier was called but, strangely, invoked his right to not incriminate himself and answered no questions.

Greenwood testified effectively in his own defense. He had an unblemished record with excellent conduct marks and was quite intelligent. The written testimony of 27 defense character witnesses was read to the members. That testimony was from, among others, Greenwood's high school principal, four teachers, two ministers, and a hometown police lieutenant.

The members were faced with the conflicting testimony of several questionable defense and government witnesses and the stipulated testimony of numerous citizens who had long familiarity with Greenwood. The members took 64 minutes to find Greenwood not guilty of all charges.

Real or Imagined: The 'Mere Gook' Rule

Three 3d Division Marines were charged with assault and rape. The evidence proved that while on patrol the three had entered a Vietnamese hut in which they found three women: grandmother, mother, and daughter. The grandmother and daughter fled when the criminal intentions of the three Marines became apparent. The mother was held at rifle point, while each raped her. The three were quickly found out and charged with assault with a deadly weapon and rape. The trial counsel, Captain David J. Cassady, elected to first try the Marine against whom the evidence was strongest. The accused did not deny intercourse, but raised consent as his defense. The members, in findings difficult to reconcile, found him guilty of assault, but not guilty of rape.

Based upon the results of the first court-martial, the charges against the two co-accuseds were dropped. If the strongest case of the three produced so negligible a result, the cost and effort involved in prosecuting the two weaker cases was not justified. Captain Cassady later spoke to the colonel who had been the senior member of the court-martial. Captain Cassady recalled the colonel saying: "Well, there's not much doubt what happened there, but we're not going to ruin the lives of these young Marines for some 'Vietnamese.' " That wasn't the word he used, Captain Cassady noted, "but that's essentially what he said. This became referred to—and there were other cases similar to that . . . . the mere gook theory. I've never forgotten that case."[74]

The term "gook" originally referred not to Vietnamese or orientals, but to Nicaraguans, its first use noted during the U.S. intervention in Nicaragua in 1912.[75] The term was a common one in Vietnam. In his book on the Vietnam war, Professor Guenter Lewy wrote: "Callousness toward the Vietnamese was . . . caused by the writings and pronouncements of many American journalists and politicians who . . . for years exaggerated the faults of the South Vietnamese . . . and gradually created an image of people not worth defending, if not altogether worthless."[76] Still, soldiers of all nations in every modern war, and probably in ancient conflicts as well, have ascribed base racial or cultural characteristics to peoples and cultures they don't understand, particularly when the enemy people or culture was of a differing race or color.

Professor Lewy continued: "acceptance of the 'mere-gook' rule has probably been exaggerated. For each misdeed and instance of mistrust and hostility, unbiased observers in Vietnam could see examples of friendship and generosity."[77] As far as courts-martial were concerned, the record demonstrates that Professor Lewy is correct: acceptance of the "mere gook" rule has been exaggerated.

Marine Corps judge advocates were aware of the asserted existence of the "mere gook" rule, and if it might aid the defense of their client, were not above considering its effect. An FLC defense counsel recalled a 1969 murder case in which the accused had purposely thrown a heavy pipe from the rear of a moving truck at a column of South Vietnamese soldiers. He killed the soldier he hit. At the outset of the Marine's court-martial the defense counsel requested that enlisted men be included on the panel of members, admitting:

> My theory was that enlisted Marines (knowing I would get E-9's [master gunnery sergeants and sergeants major] and above) who had fought in the Pacific during World War II, Korea and now, Vietnam, would not be particularly disturbed about the death of another "gook." In interviewing members of the court following the trial, my hypothesis proved correct.

The accused was convicted only of a lesser offense and sentenced to six months confinement, later reduced to a shorter period after the enlisted members of the court and one of the officers joined in a petition for clemency.[78]

Individual anomalies like the foregoing case can always be found, but did the usual case exhibit a callousness toward the Vietnamese victim?* During the war, 27 Marines were convicted by courts-martial of murdering South Vietnamese non-combatants.**[79] In several of those cases there were multiple victims or associated crimes, such as rape. Twenty-five of the 27 received, among other punishments, dishonorable discharges; the other two received bad conduct discharges. In 15 of the 27 convictions, the sentence imposed by the trial court included confinement at hard labor for life; three other cases included confinement for 20, 30, and 50 years. Only in seven of the cases was the imposed confinement less than 10 years.[80] Case comparisons are suspect, but the range of sentences meted out by courts-martial was comparable, at least, with those that might be anticipated in a civilian jurisdiction. At the trial level, Captain Cassady's case notwithstanding, Marine Corps court members apparently did not consider the Vietnamese to be beneath justice.

Acquittals can be as revealing as sentences imposed, because acquittals may indicate the reluctance of a court to convict, let alone sentence an accused. Sixteen Marines, or 37 percent of those tried for the murder of Vietnamese noncombatants, were acquitted or had their charges judicially dismissed.[81] In United States District Courts in 1969, 33 percent of the homicide cases that went to trial resulted in acquittal or dismissal, a rate essentially the same as that found in Marine Corps courts.[82]

As in civilian jurisdictions, however, significant reductions in the confinement portions of sentences resulted from appellate review and parole and clemency action. How did the 27 Marines convicted of murdering Vietnamese noncombatants fare? After completion of clemency action only two of the 27 court-martial sentences remained in excess of 10 years: 12 and 19 years.*** Seventeen of the other sentences were reduced to less than five years confinement. Charges were dismissed in two instances.[83] The average time served by the 27 convicted murders was less than four years.[84]

The "mere gook" rule may have existed in isolated instances at the trial level, employed in either the findings or sentencing phases of courts-martial, but statistical evidence refutes any assertion that such a racist, reprehensible mind-set had any recurring effect in homicide cases. Similar statistics are available for other major felonies and reflect a like conclusion. But notable reductions in sentences were seen at the appellate level, followed by further abatement as a result of clemency and/or parole action.**** Professor Lewy suggests that those reductions, too, were consistent with civilian experience:

> It is well known that civilian parole boards often act as much in response to political pressures and the currents of public opinion as on the basis of the severity of the crime or the conduct of the prisoners, and the situation was probably no different in the case of servicemen convicted of atrocities or war crimes in Vietnam. In short, in order to account for light sentences and early release on parole for such men there is no need for the "mere-gook" hypothesis.[85]

As in any codal or statutory scheme, the UCMJ raised such safeguards as were possible against courtroom injustices, but there is no litmus test to uncover hidden ignorance and bigotry.

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*In *U.S. v. PltSgt Roy E. Bumgarner*, U.S. Army (43 CMR 559, ACMR, 1970), the accused, charged with premeditated murder, admitted killing three Vietnamese male noncombatants. He argued the killings were justifiable as having been committed in the performance of duty during a combat mission. Found guilty of the lesser included offense of unpremeditated murder in all three instances, the members sentenced him to reduction in rank to private, and forfeitures of $97 per month for 24 months. No confinement was imposed. At the appellate level error was found and the sentence was reduced to reduction to private and forfeiture of $97 dollars per month for six months. Pvt Bumgarner was then reenlisted.

**Ninety-five Army personnel were similarly convicted. (Lewy, *America in Vietnam*, p. 325.)

***"Good time," the credit received for good behavior while in confinement, potentially reduced longer sentences by as much as a third. If a prisoner was confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or the Disciplinary Command, Portsmouth, New Hampshire, "extra abatement" was sometimes available, in addition to good time. So, although the Corrections Manual indicated the maximum "good time" applicable in sentences of 10 years or more was 10 days per month, in fact, if an extra abatement waiver was in effect, a prisoner could receive up to 17 days credit per month beyond time actually served, effectively reducing a sentence by 57 percent even before clemency or parole action was considered. The decision to issue an extra abatement waiver for a certain period of time rested with the Commandants of the Disciplinary Barracks and Disciplinary Command.

****See Appendices E and F.

On the morning of 1 March 1969 an eight-man Marine ambush was discovered by three Vietnamese girls, aged about 13, 17, and 19, and a Vietnamese boy, about 11. The four shouted their discovery to those in the nearby village who were being observed by the ambush. Seized by the Marines, the four were bound, gagged, and led away by Corporal Ronald J. Reese and Lance Corporal Stephen D. Crider.[86] Minutes later, the four Vietnamese were seen, apparently dead, in a small bunker. The Marines tossed a fragmentation grenade into the bunker, which then collapsed the damaged structure atop the bodies. Those responsible were apprehended and tried. Reese was convicted of four specifications of murder. His sentence included confinement at hard labor for life and a dishonorable discharge.

Crider, too, was convicted of four specifications of murder and received a like sentence, except that no discharge was imposed. Moreover, all eight of the members of Crider's court, including two colonels, joined in a petition for clemency. In it they told the convening authority that, given the military judge's instructions, they felt compelled to impose confinement for life, but they urged that all confinement in excess of three years be disapproved. A telling phrase in the petition read that "the fact of his apprehension, confinement, and trial are sufficient in themselves to satisfy the requirements of the Vietnamese society."

The military judge again was Lieutenant Colonel Hank Hoppe. He received the members' petition with its recommendation of three years confinement and, because the sentence included no discharge, a return to duty. Incredulous, he asked the members, on the record, if they had considered imposition of a discharge? He was assured they had, but they felt that Crider should be returned to duty as a Marine after serving his confinement for the murder of four children. Colonel Hoppe described what followed:

> I adjourned the court, the court reporter shut off his machine, at which time I told the members of the court that they had, in my opinion, just prostituted 190-odd years of Marine Corps history . . . . The next day [I] was advised that the commanding general [the convening authority in the case] wanted to see me. You are aware, of course, that commanding generals have no control over the judges . . . . The general inquired if I had indeed made those remarks to officers who were my seniors? I assured him that I had, and he said, "Thank you very much. Now I don't have to do so."[87]

At the appellate level Crider's confinement was reduced to three years. Because his co-actor's confinement was cut, Reese's confinement for life also was reduced to three years.

Marine Corps Historical Collection

General court-martial military judge, Col Henry Hoppe III, seen returned from Vietnam. "I told the members of the court that they had, in my opinion, just prostituted 190-odd years of Marine Corps history."

Perspective

Not only was the 1969 court-martial rate higher than ever before, but the nature of the offenses had changed. Currency manipulation, black marketeering, destruction of government property, even negligent homicide, although still frequent enough, were no longer the daily fare of the Marine Corps judge advocate. Now the lawyers were coping with a major breakdown in discipline and a disrespect for authority in general, as evidenced by the most serious kinds of offenses: murders and aggravated assaults in numbers that only three years previously would have been considered incredible. The sale and use of marijuana was so prevalent that it overloaded the general court-martial process and often did not even result in a special court-martial. The brig was so filled with hardened individuals that, even when a court-martial ended in a sentence to confinement, commanders declined to send first-time offenders to its confines. Racial inci-

dents, which had been a frequent occurrence, now sometimes evolved into deadly encounters in which the participants armed themselves with weapons intended for combat with the enemy. At FLC, to prevent further fraggings, the Maintenance Battalion enlisted men's club was lit by high-powered search lights and armed sentries patrolled its perimeter.[88]

With all this, however, it should not be forgotten that the far greater number of Marines served honorably and bravely. Relatively few became involved in the military justice process. Nevertheless, Marine Corps judge advocates who dealt with the criminals on a daily basis might have agreed with Colonel Robert D. Heinl when he wrote:

> By every conceivable indicator, our army that now remains in Vietnam is in a state approaching collapse . . . . Murdering their officers and noncommissioned officers, drug-ridden, and dispirited . . . buffeted from without and within by social turbulence . . . race war . . . and common crime . . . . Often reviled by the public, the uniformed services today are places of agony for the loyal, silent professionals who doggedly hang on and try to keep the ship afloat.[89]

Discipline had fallen into disarray, and it would be a long time recovering. During this period some Marine judge advocates assumed from their experience that 1969 was representative of caseloads and case complexion. They did not realize that they were struggling through the Marine Corps' disciplinary nadir.

CHAPTER 7

1969: Military Justice Tested

III MAF: No Longer Two Hats—1st Marine Division: The Law Center Concept
3d Marine Division: More Combat, Fewer Courts—From a Lawyer's Case File: Murder on Stage
1st Marine Aircraft Wing: Looking For Action—Force Logistic Command: Approaching Breakdown
Trying Cases—Exits: Marine Corps Draw Downs—Perspective

At the outset of 1969 III MAF estimated there were 90,000 enemy troops in the I Corps tactical area of responsibility or poised on its borders. Along the DMZ the 3d Marine Division enjoyed a combat lull, until it began Operation Dewey Canyon, south of Khe Sanh. By the time that operation ended in mid-March, more than 1,600 of the enemy had been killed and 1,461 weapons captured. The 1st Marine Division guarded the approaches to Da Nang, while its Operation Taylor Common continued. The 1st Marine Aircraft Wing was preparing to redeploy several squadrons to Iwakuni, Japan, and to Okinawa.[1]

By 1969 the assignment of junior lawyers to Vietnam, lieutenants and captains, was controlled by the Staff Legal Officer (SLO) of Headquarters, Fleet Marine Force, Pacific (FMFPac), in Hawaii. In 1969 the SLO was Colonel Robert C. "Curly" Lehnert, who was assisted by his deputy, Major William H. J. Tiernan. Both officers had led the 1st Marine Aircraft Wing's Da Nang legal office in 1968. Headquarters Marine Corps forwarded to FMFPac the names of captain and lieutenant lawyers to be transferred to Vietnam, Okinawa, and Japan. At FMFPac, the SJA allocated the lawyers, by name, to the various commands.[2] Assignment of attorney majors, lieutenant colonels, and colonels continued to be controlled by Headquarters Marine Corps. About 90 Marine Corps judge advocates were in Vietnam at any given time in 1969. By comparison, the U.S. Army had 135 lawyers in Vietnam during the same period.[3]

III MAF: No Longer Two Hats

On 26 March 1969 Lieutenant General Herman Nickerson, Jr., succeeded Lieutenant General Cushman as Commanding General, III MAF.[4] Colonel Duane L. Faw, who had been double-hatted as III MAF Deputy Chief of Staff and MAF Headquarters Staff Legal Officer, had been succeeded by Colonel Paul W. Seabaugh in August 1968. Colonel Seabaugh, holder of the Bronze Star Medal for service in Korea, was assisted by Captain G. Ward Beaudry, followed by Captain Stanton M. Cole, and later Captain Emilic V. Belluomini, Jr. Although there were few court-martial cases in the Headquarters—never more than two at a time during this period—Colonel Seabaugh acted solely as the SLO/SJA.[5] III MAF still did not have the authority to convene courts-martial, and as in the early months of the war military justice activity in the legal office was slow. But the SLO/SJA billet was a busy one. Hundreds of "JAG Manual" personal property loss investigations were processed by III MAF "legal," for example. Each time a supply dump or depot was rocketed or burned, Marines who lost personal gear to damage caused by the enemy shelling submitted claims for reimbursement for their lost belongings. Legal assistance matters arising in the Headquarters were continually dealt with, as well. To keep the III MAF brig population manageable, the SLO/SJA coordinated shipment of prisoners out of Vietnam to other brigs.[6] There was more than enough work to keep III MAF Headquarters lawyers occupied.

On 27 April Ammunition Supply Point No. 1, not far from III MAF Headquarters, caught fire when burning trash started a grass fire which, in turn, ignited stored munitions. The resulting explosions destroyed 38,000 tons of ammunition and 20,000 drums of fuel. The fire damaged the nearby III MAF brig to the extent that the prisoners were moved to temporary locations at Camp Books, Red Beach, and the Naval Supply Activity Hospital prison ward.[7]

In August 1969 Colonel Marion G. Truesdale, previously Colonel Charles B. Sevier's successor as Director of the Judge Advocate Division at Headquarters Marine Corps, relieved Colonel Seabaugh. In World War II Colonel Truesdale had been an infantryman, commanding a machine gun platoon on Peleliu under Lieutenant Colonel Lewis B. "Chesty" Puller. Colonel Truesdale had also been in combat on Okinawa. At III MAF Headquarters, in addition to his duties as SJA, he acted as Chief of Staff whenever the actual Chief was absent.[8]

1st Marine Division: The Law Center Concept

The enemy's 1969 Tet Offensive, although only a shadow of the prior year's offensive, struck Da Nang

Photo courtesy of Col Marion G. Truesdale, USMC (Ret.)

In August 1969 Col Marion G. Truesdale, left, being sworn as a military judge, relieved Col Paul W. Seabaugh, right, as SJA of Headquarters, III MAF.

on 23 February. The enemy suffered heavy losses when his sapper attacks on the 1st Marine Division's command post on Hill 327 were beaten back, largely by reaction companies and elements of the 7th Marines.[9] One of the reaction companies was commanded by a judge advocate, Captain Francis J. Kaveney. The executive officer (second in command) of another heavily engaged reaction company was Captain W. Hays Parks, chief trial counsel for the 1st Division. Several other judge advocates were involved in the defense of the command post as commanders of reaction platoons, as well.

In August 1968 Colonel Jack E. Hanthorn replaced Colonel Clyde Mann as Division SJA. Colonel Hanthorn was in combat on Roi-Namur, Saipan, Tinian, and Iwo Jima in World War II and fought in Korea. Several times he had commanded infantry companies and briefly in 1965 had commanded the 1st Marine Brigade.[10] In mid-year Lieutenant Colonel Robert M. Lucy, who would be promoted to colonel two months after his arrival in Vietnam, succeeded Colonel Hanthorn. While virtually all of the senior legal officers early in the Vietnam conflict had been in combat in World War II, now the in-coming SJAs, like Colonel Lucy, had not. Colonel Lucy, a 1947 graduate of the U.S. Naval Academy, had been an infantry officer in the Korean War and participated in the Inchon landing as a weapons company commander, and was awarded the Bronze Star Medal.[11]

Living conditions at 1st Marine Division Headquarters remained comfortable. The SJA shared his SEAhut with one other colonel and dined in the commanding general's mess each evening. He enjoyed luxury unsuspected by less senior Marines.[12] Captains and lieutenants were billeted six to a SEAhut, but their hooches were larger than the colonel's and usually included a television set and a small, two-cubic-foot refrigerator, which passed from occupant to occupant, as tours of duty were completed. The enlisted legal Marines had quarters identical to the officers, usually including refrigerators and television sets. Like Marines at the Da Nang Airbase, lawyers on Hill 327 had learned to live with the rocket attacks on Da Nang.

Personnel of the Office of the SJA, 1st Marine Division, shown on Hill 327 in 1969. Seated officers are, from left, Capt Allen E. Falk; Capt George G. Bashian, Jr.; Capt Martin G. McGuinn, Jr.; LtCol William R. Eleazer; SJA Col Robert M. Lucy; Deputy SJA LtCol James P. King; Capt Arthur W. Tifford; legal admin officer, CWO4 Maynard K. Baird; Capt Franz P. Jevne; and Capt John D. Moats. The legal chief, MSgt Atkins, stands at right.

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

Marine Corps Historical Collection

The III MAF brig, shown in 1969. The brig buildings, right center, adjoin the POW compound, which still housed 19 North Vietnamese sailors, the compound's only occupants during the war. Many buildings show the effects of the explosion of Ammunition Supply Point 1 shortly before this photograph was taken. The top of one guard tower is destroyed.

Captain Daniel H. LeGear, Jr., a 1st Marine Division defense counsel recalled: "We did have sandbag bunkers for such attacks, but after the first few attacks they were rarely used. We would either sleep through them or awake and watch the action down around the airfield."[13]

The 1st Division SJA's manning level was 23 judge advocates, 1 legal administration officer, and 38 enlisted men.[14] During 1969 the actual number of lawyers varied from 18 to 33, with the average being somewhere between 20 and 25. The quality of the officer lawyers was termed "excellent" by the SJA, although three out of four arriving lawyers came straight from Naval Justice School (now expanded from 7 to 10 weeks in length) and had never tried a case before.[15] "That's a very bad policy," Colonel Lucy said. "We're in the big leagues, now." The return to Vietnam of seasoned officers such as Lieutenant Colonel James P. King, on his second Vietnam tour, was an important addition to office effectiveness.

One of those assigned to the 1st Marine Division's SJA office was 1st Lieutenant James M. Schermerhorn, a law school graduate who had not yet passed a bar examination. Because he was not a member of any state's bar, he could not be designated a judge advocate and could not be a defense counsel. He could be employed as a nonlawyer trial counsel (prosecutor). Any mistake he might make would affect the government rather than the accused. For six months before joining the SJA's office, Lieutenant Schermerhorn had been a platoon commander with the 7th Marines, where he served with distinction and was awarded the Silver Star and Navy Commendation Medals for combat bravery.[16]

The caseload in the 1st Division remained low, although its nature had changed. Each judge advocate carried about one general court-martial and eight to 10 specials.[17] The overall decline in discipline was bringing more significant cases. "Sixty percent of all our crimes are crimes of violence—and they're serious," Colonel Lucy reported.[18] The trial of several murder cases in a single month was no longer unusual. During 1969 1st Division personnel were charged with 13 murders, 32 aggravated assaults, 41 simple assaults, 2 rapes, and 490 marijuana/narcotics offenses.[19]

By 1969 those convicted and sent to the brig were usually such poor quality personnel that commanders hesitated to allow any but their worst men to be incarcerated there. They believed that conditions in the brig offered no hope of rehabilitation. As First Lieutenant Warren S. Mathey, FLSG-A's group legal officer, reported:

> Any time we have a man that goes before a special court that we feel is a good man and has learned his lesson from a court alone, we do not confine him at the brig . . . . Borderline cases that received six months from a court, six

> months confinement, we've kept them out of the brig . . . . If they went to the brig it'd have a much greater ill-effect on them.[20]

Lieutenant Mathey also noted that the brig was not even considered for pretrial confinement of accused Marines. Instead, they were held for up to 10 days in CONEX boxes—metal storage containers about eight feet by ten feet and about six feet tall. Not as harsh as their description implies, CONEX boxes were often partially buried and sandbagged, making them fairly secure from enemy fire and insulated, to a degree, from weather extremes.[21]

The same inadequacies that plagued the legal effort in the past remained problems. Colonel Lucy called the recording equipment "still a miserable situation," noting that, even though IBM equipment had largely replaced the Grey recorders, repairs were available only in Saigon. That required an officer or NCO to escort the gear there and back to ensure it was not lost or forgotten. Mail, Colonel Lucy said, just took too long. The remaining Greys still had to go to Japan for repair, which took three to four months if sent by mail. Finally, the colonel authorized purchase of four Sony tape recorders from the PX for the use of court reporters.

Equally vexing was court reporter proficiency. Colonel Lucy noted that, while there were enough of them, "the quality of court reporters that we've been getting has been terrible." Most required on-the-job training, risking the loss of a case because of a significant error in recording or transcribing the record of trial.[22] Each year since the beginning of the war SLOs and now SJAs had discovered anew the same reporter inadequacies. Each had passed word of those inadequacies to higher authority, yet the deficiency continued unresolved. Without priority in assignment of MOS, the legal community was too often left with enlisted personnel who had been shunted from infantry training because of a lack of aptitude or ability in that nontechnical field. While many junior legal clerks were stellar Marines and impressive workers, too often they were forced to carry the workload for their less able peers.

Second lieutenant John R. "Rusty" Taylor, Jr., and his wife Priscilla were married shortly before he departed for Vietnam and the office of the 1st Marine Divi-

Rather than send Marines to the III MAF brig, pretrial confinement was sometimes served in CONEX boxes like the one at left. This CONEX box was part of a mail facility.
Photo courtesy of LtCol David Douglas Duncan, USMCR (Ret.)

sion's SJA. Priscilla obtained a 90-day visa allowing her to enter Vietnam on the strength of promised employment in Saigon with an American doctor who was a family friend. Three weeks after her husband's departure Priscilla flew to Saigon where she and Rusty had assumed he would be stationed. Lieutenant Taylor had managed to get word to her prospective employer of his actual location and Priscilla took an Air Vietnam commercial flight to Da Nang. Unaware of Priscilla's arrival, Lieutenant Taylor did not meet her at the airbase, which also serviced the country's few civilian aircraft. An American civilian worker took Priscilla in tow and delivered her to the 1st Marine Division compound and her husband's office.

Lieutenant Taylor had arranged for Priscilla to be quartered in Da Nang in the back room of the office of an American Catholic priest. She found employment at the Da Nang USO as a counter girl with a grand salary of 50 cents per day. Although Lieutenant Taylor was required to be "inside the wire" each night, he and Priscilla met in Da Nang with some regularity over the next month and a half. Inevitably the SJA, Colonel Lucy, learned of her presence. When he did he ordered Lieutenant Taylor to immediately see to her departure, upon pain of his being sent to the farthest of the division's outposts. Already concerned for her safety in the frequent rocket attacks on Da Nang, Lieutenant Taylor bid Priscilla goodbye and she returned to the United States without having been paid by the USO. All concerned heaved a sigh of relief, including the Catholic priest who found it difficult to explain to his flock his relationship with the woman who slept in the back of his office.[23]

With implementation of the Military Justice Act of 1968, the law center concept became a practical alternative to prior methods of managing and processing cases. All legal assets and personnel were consolidated in the various SJAs' offices. No longer were reporters assigned to the separate infantry battalions and aircraft groups. Line officers were no longer trial and defense counsels, and charge sheets were no longer drafted by infantry administrative clerks. The staff judge advocate's office embraced the entire process. Now, a field command sent an offense report to the SJA's office, where charges were drafted, counsels assigned, and a tentative trial date set. At trial a legal clerk assigned to the SJA's office recorded the trial and afterward made a typed copy of the record. An initial review was prepared in the review "shop" of the SJA's office and forwarded to the convening authority for approval. Once approved, the case continued up the appellate chain, if appropriate. For the first time the SJA's office had the capacity to act as a full-service legal center.

The Navy had been first to employ the law center approach in 1966.* Initially calling it the County Courthouse System, Colonel Lucy found the law center concept an efficient method which relieved field commanders of a heavy burden. As he pointed out, "if we can do it in combat, we can do it anywhere."[24]

Law centers required a knowledgeable manager to ensure their smooth functioning; someone, akin to a civilian office manager, not concerned with trial preparation, who could track case progress and ensure proper documentation, format, and timeliness from original complaint to conviction or release. Those managers were the Marine Corps' legal administrative officers. In 1967 a one-year pilot program had been initiated at Camp Pendleton to test the practicality of "legal admin" officers, and it proved a major success. As a result such officers were assigned to all Marine Corps legal offices. Legal admin officers were usually former enlisted legal clerks or reporters, appointed as warrant officers and given a general administrative officer's MOS. Later, they would have a separate MOS designating them as legal administration specialists. Colonel Lucy wrote to Brigadier General Faw, then the Director of the Judge Advocate Division at Headquarters Marine Corps that "I think this warrant officer billet of administrative officer is absolutely essential . . . . Chief Warrant Officer Baird [the 1st Marine Division's incumbent] is an outstanding addition to this office."[25]

Chief Warrant Officer 4 Maynard K. "Sonny" Baird, the first Marine to be designated a legal admin officer by military occupational specialty (MOS), was also the first to arrive in Vietnam. ("Gunner" Baird had briefly been in Soc Trang, Vietnam, in 1962 with Shufly personnel.** He had been the station adjutant and legal officer at the Marine Corps Air Station, Fute-

*In 1965 a Secretary of the Navy task force recommended formation of Navy legal services offices. The pilot office was established at Norfolk, Virginia, in 1966. When that proved successful a second was formed in San Diego, California, with others soon following. By 1970 the Navy had 30 operational law centers worldwide. (U.S. Court of Military Appeals, *Annual Report of the U.S. Court of Military Appeals & the Judge Advocates General of the Armed Forces & the General Counsel of the Department of the Treasury, For the Period January 1—December 31, 1966*; and [same title] *For the Period January 1—December 31, 1969* [Washington: GPO, 1966 and 1969, respectively], pp. 26 and 28, respectively.)

**See Chapter 1.

Photo courtesy of RAdm Hugh D. Campbell, JAGC, USN (Ret.)

At Quang Tri, 3d Marine Division legal personnel take time out. Capt Clarke C. Barnes, center, spikes the ball past Cpl J. R. Hartman. Capt David J. Cassady, left, looks on.

ma, Okinawa, at the time.)[26] He was invaluable in establishing and refining the law center concept to which Marine Corps SJAs were moving, while also serving as the 1st Marine Division's claims officer and review officer. For his work in Vietnam he later received the Bronze Star Medal.[27] The law center concept became the model employed throughout the Corps for the rest of the war and afterward.

3d Marine Division: More Combat, Fewer Courts

Operations Kentucky, Dewey Canyon, and Virginia Ridge, three of the division's most costly but successful 1969 operations, continued through February, March, and July, respectively.[28] The office of the 3d Marine Division's SJA remained at Quang Tri Combat Base with the division headquarters (rear). After four months as the division chief of staff, Colonel Joseph R. "Mo" Motelewski returned to legal duty as the division SJA. The number of judge advocates in the 3d Division varied throughout the year from 20 to 30.[29]

Construction of an air conditioned courtroom was completed in April. Styrofoam, used in packing artillery fuses, was seldom encountered in volume but Lieutenant Colonel Rollin Q. Blakeslee, the deputy SJA, managed to have an entire planeload of it delivered to the SJA's office. No one was sure what to do with it but eventually the lawyers decided that it would make great insulation for the courtroom, which is how it was finally employed.[30]

In September Lieutenant Colonel Benjamin B. Ferrell became the division SJA, succeeding Colonel Motelewski, who later received the Legion of Merit for his performance of duty as chief of staff and SJA. Lieutenant Colonel Ferrell would later oversee the 3d Marine Division lawyers as they withdrew from Vietnam, together with the rest of the division and would, himself, receive the Legion of Merit. But for the two months his office was in Vietnam, his difficulties as SJA were no different than his predecessors': transportation, court reporters, and equipment. As Lieutenant Colonel Ferrell noted: "The most frustrating aspect . . . was the continual breakdown of recording equipment. No system we tried could be relied on to function for long in the dusty or rainy weather of Vietnam."[31]

The most heavily engaged division in III MAF, the 3d Marine Division also had the fewest court-martial offenses.[32] Although more cases were awaiting trial than ever before, the division was still relatively untouched by the breakdown of discipline, which affected most rear area units. At any given time a 3d Marine Division judge advocate's caseload was around two or three general courts-martial, 20 to 30 specials, and five or six admin discharge cases.[33] While the numbers were