MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE

COVER: Maj Winn M. Thurman presides at an investigation in the NCO club of the 2d Battalion, 1st Marines, in July 1967. The reporter, Cpl Michael J. Partyka, uses the closed microphone system to record the testimony of the Vietnamese witness, as repeated by the translator. Other participant is Capt Eugene A. Steffen, at left.

Photo courtesy of Col Donald Higginbotham, USMCR

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MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE

by
Lieutenant Colonel Gary D. Solis
U.S. Marine Corps

HISTORY AND MUSEUMS DIVISION
HEADQUARTERS, U.S. MARINE CORPS
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Foreword

This is the second of a series of functional volumes on the Marine Corps' participation in the Vietnam War, which will complement the nine-volume operational and chronological series also underway. This particular history examines the Marine Corps lawyer's role in Vietnam and how that role evolved. Also considered is the effectiveness of the Uniform Code of Military Justice in a combat environment.

Military law functioned in Vietnam, but was it acceptably efficient and effective? There were several thousand courts-martial tried by the 400 Marine Corps lawyers who served in Vietnam. Those trials stand as testament to the Marines, officer and enlisted, who made the justice system yield results through their work, dedication, and refusal to allow the circumstances of Vietnam to deter them.

Did the military justice system really work? The reader can be the judge, for both successes and failures are depicted here. This book presents a straightforward and unflinching examination of painful subjects. Marine lawyers in Vietnam came to legal grips with drug use, racism, fragging, and the murder of noncombatants, along with the variety of offenses more usually encountered. The Marine Corps can take pride in the commanders and the judge advocates who ensured that whenever those crimes were discovered they were exposed and vigorously prosecuted. There were no cover-ups; no impediments to the judge advocates who conscientiously represented the accused or the United States.

To study the military lawyer is to examine the military criminal. Reprehensible acts and unsavory individuals are described here. The outcomes of some cases are shocking and dismaying. But while verdicts cannot be ordered, the cases were always brought to trial.

The author, Lieutenant Colonel Gary D. Solis, was first in Vietnam in 1964 as an amphibian tractor platoon commander. He returned there in 1966-67, when he commanded Headquarters and Service Company, and then Company A, 3d Amphibian Tractor Battalion. He later received his law degree from the University of California at Davis and a master of laws degree in criminal law from George Washington University. He was chief trial counsel of the 3d Marine Division on Okinawa in 1974, then of the 1st Marine Division at Camp Pendleton in 1975-76. Later, he was the staff judge advocate of Headquarters Fleet Marine Force, Atlantic, and head of the Military Law Branch, Judge Advocate Division. He served two tours as a general court-martial judge and is a member of the bar of three states and the District of Columbia. He is a past secretary of the Marine Corps Historical Foundation and a member of the Supreme Court Historical Society. He served with the History and Museums Division from August 1986 to June 1989, when he retired from active duty.

E. H. SIMMONS
Brigadier General, U.S. Marine Corps (Retired)
Director of Marine Corps History and Museums

Introduction

The war in Vietnam has long since passed from the headlines to the history books, yet the many issues it raised have only slightly receded, and the controversy barely at all.

The functioning of the military justice system in that war—the practice of criminal law on the battlefield—is one of those issues, and the controversy sparked by it is far from being extinguished. To the contrary, that system's increasing "civilianization" by statutory and appellate law keeps the ember alive, potentially to flame anew to bedevil our commanders in the next war.

But, as with so many such issues, the debate is conducted with little fact intruding on the rhetoric. This volume goes a long way toward remedying that omission. In it are assembled the recollections, reflections, and accumulated wisdom of those charged with making that system—a relatively primitive version of today's—work in Vietnam.

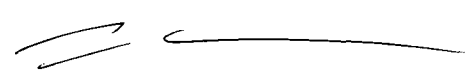
What a curious group it was: The senior leadership of Marine Corps lawyers (they would not be titled "judge advocates" until well past halfway in the war) was predominantly combat officers, who had served in World War II and Korea in "line" billets, and who had later come into the legal field. The "worker bees," the trial and defense counsel, were almost exclusively first-tour Reservists, many only recently removed from the hotbeds of antiwar activism which their college campuses had become. A surprisingly thin cushion of mid-career lawyers filled the interface.

Yet differences of background and of such temperament and philosophy as existed were submerged, for in its essential construct, the law is the great unifier of peoples and societies. And thus it was too for our lawyers in Vietnam: the single focus of this diverse group and of their common effort was to make the system "work." We each must draw our own conclusion concerning their success or failure.

However, to read this volume only to resolve such weighty questions is to overlook much of its worth. It also tells an interesting story—as well it should. For writing history is much like preparing a difficult and complicated case for trial. One must conduct thorough research, interview many witnesses, visit the scene of the crime, develop a theory of the case, marshal the facts persuasively to support it, and finally, present the results of all this effort in a manner that will hold the listener's attention.

Accordingly, when we conceived the idea of an official history of the activities of Marine Corps judge advocates in Vietnam, we looked for an officer who excelled as a trial advocate and who had fought in Vietnam. We found one in the author, Lieutenant Colonel Gary D. Solis.

As this volume attests, we made a good choice. Because he has been both a combat officer and a judge advocate, Lieutenant Colonel Solis brought to this effort a unique perspective. He also brought to it a talent for research and writing, which I think has resulted in not only an outstanding piece of scholarship, but also a compelling and unusual piece of literature.



MICHAEL E. RICH
Brigadier General, U.S. Marine Corps
Director, Judge Advocate Division

Preface

"In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats."

Ball et al. v. United States
366 U.S. 393, 401 (1961)

Of the 448,000 Marines who served in Vietnam, only a small percentage came into contact with the military justice system. By far the greater number served honorably and never committed illegal or improper acts. But in a book about lawyers and military law—a criminal justice system—the focus is necessarily upon criminals as well as lawyers.

In this volume a number of cases are recounted in which the accused escaped punishment or even trial, despite clear indications of guilt. Military law, like civilian criminal law, demands proof of guilt beyond a reasonable doubt for a conviction. When the government falls short of that high standard, for whatever reason, the accused must go free. Occasionally that results in a seeming miscarriage of justice. Recounting such cases may illustrate the workings of the system and make for interesting reading, but they were not the norm. The reader should not be misled into thinking that most Marines were criminals, nor that most, or even many, courts-martial ended in acquittal.

This book relates events that occurred in Vietnam, with only that description of incidents in the U.S. and elsewhere as necessary to explain the evolution of the Marine Corps' Judge Advocate Division and to describe a few wartime cases tried in the U.S. There is little mention of the significant support provided Vietnam lawyers by judge advocates on Okinawa, in Japan, and in the United States. Nor is distinction made between Reserve and regular officers; such distinctions were ignored in the combat zone. The grades used in the body of the text are those held by individuals at the time they are mentioned.

Court-martial cases are described to the exclusion of nonjudicial punishment. Although NJP was the commander's most immediate and most frequently employed disciplinary tool, it does not usually involve lawyers, it is reserved for minor offenses, and no detailed records of its employment are kept.

Not all participants will agree with everything I have written. The voice of memory is single and uncontested and tends to rigidify with time. History, on the other hand, allows many voices, is open to debate and calls for revision. Still, all history is an interpretation, and I have doubtless made mistakes. I alone am responsible for the text and any errors found there.

The history of Marine Corps lawyers in Vietnam is based on more than official records, books, records of trial, journals, and newspapers. Hundreds of letters to and from the lawyers who served in Vietnam have resulted, I believe, in a uniquely personal view of the events of that period which no official source can impart. I thank those who contributed so much through their responses to repeated inquiries, notably Colonels Clarke Barnes, Pete Kress, Charlie Larouche, Mike McCollum, and former Captains Tone Grant and Chuck Kall. Also, Mr. Denzil D. Garrison was unfailingly helpful. Almost a hundred reviewers, most of whom served in Vietnam, read a draft of the manuscript. Their comments were indispensable and where applicable are incorporated into the text.

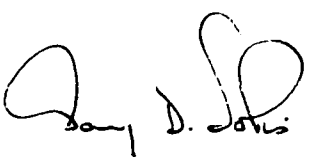
Thanks are due Mrs. Pat Amenson and her predecessor, Mrs. Ellen Burkett, of the

Promulgation Section, Office of the Judge Advocate General of the Navy. They lent vital support in locating obscure records of trial.

No history volume has a single author. Colonel W. Hays Parks began this project some 10 years ago. The questionnaire he developed and the letters he collected were critical foundations for my research. Major Leonard A. Blaisol's perceptive critiques of draft chapters were invaluable. Mr. Jack Shulimson, Histories Section head, and Mr. Henry I. Shaw, Jr., Chief Historian of the History and Museums Division, were patient mentors who willingly imparted their experience and expertise.

Thanks to Brigadier General Michael E. Rich, Director of the Judge Advocate Division and friend of many years, who conceived the idea for this book. He was my harshest critic, strongest support, and most perceptive editor.

Finally, this volume is dedicated to Mrs. Carolyn Faye W. Marshall, personal secretary to every director of the Judge Advocate Division since its formation in 1968, and secretary to the Head, Discipline Branch, before that. Besides her encyclopedic memory, good humor, and always willing assistance, her long and dedicated service to the Marine Corps and its lawyers are without parallel. She is a wonderful person and we are proud to know her.



GARY D. SOLIS
Lieutenant Colonel
U.S. Marine Corps

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Captain Peter N. Kress arrived in Vietnam a little after noon on 8 March 1965. He carried a seabag, a *Manual for Courts-Martial*, a JAG Manual, and a yellow legal pad.* He was the first Marine Corps lawyer assigned legal duty in Vietnam. Three hours earlier that day, at 0903, elements of the 9th Marines were the first ashore in a major escalation of the war. At the same time, Air Force C-130s carrying portions of the 1st Battalion, 3d Marines began landing at Da Nang, arriving from Futema, Okinawa.[1] Captain Kress was in the initial contingent that arrived by air. At the end of a second tour of duty in Vietnam six years later, Lieutenant Colonel Kress would be one of the last Marine Corps lawyers to leave Vietnam.

The units that landed in Da Nang were part of the 9th Marine Expeditionary Brigade (MEB), from Okinawa. The senior lawyer on Okinawa was Colonel Olin W. Jones, the staff legal officer (SLO) of the 3d Marine Division. Several days before the landings he had conferred with the Commanding General, 9th MEB, Brigadier General Frederick J. Karch. They decided to detail a legal/civil affairs officer to the MEB, which was then afloat in the South China Sea preparing for the imminent Vietnam landings.[2] They selected Captain Kress.

As Captain Pete Kress recalled his arrival, Da Nang was even more humid and hot than Okinawa. But this was not his first time in uncomfortable operational circumstances. He had been a Marine for nearly 11 years, formerly a company commander and, just two years previously, a weapons instructor at The Basic School. While stationed at Quantico, Virginia, he had attended Georgetown University's law school at night, graduating in 1962. He transferred to Quantico's staff legal office and in December 1964 proceeded to Okinawa for duty.

After landing, Captain Kress and the other members of the MEB staff trudged to the nearby French-built compound that lay just west of the Da Nang Airbase runways. They moved into an unpainted concrete, one-story, L-shaped building, reputedly a former French Foreign Legion barracks. Field desks were set up throughout the short side of the L and the MEB staff began operating ashore. The small rooms that ran down the long arm of the L served as the officers' billeting spaces.

Because his work would involve occasional confidential discussions with Marines needing legal assistance, as well as those involved with some aspect of courts-martial, Captain Kress was given permission to locate his "office" in his quarters, away from the distractions of the MEB staff. He set up a field desk in his room, penned "Staff Legal Office" on a piece of yellow legal paper, and taped it to the door. The Marines' first legal office in Vietnam was open for business.[3] Captain Kress was beginning the newest chapter in a story of military law and Marine Corps lawyers that had begun long before.

Ancient Roots

Military law is virtually as old as military force. Until recently, there were two distinct bodies of military law: that of the sea, and that of land armies. A body of sea-law took form under the Phoenicians, eventually inherited and shaped to the modern world by the English, who, in 1649, during the era of Cromwell, adopted rules for governing the fleet. These were the precursors of modern American naval law.

The law governing armies arose under the Romans and their legion tribunes, who administered the *Magistri Militum*. Later, the Franks produced the first known written code of military law, and William the Conqueror introduced his version of military justice to England in 1066. In 1640 Parliament passed the landmark Ordinances of Armies, and later the American colonies followed the British pattern.

In 1775 the Continental Congress adopted the first American code, based on the British Articles of War. On the naval side, Rules for the Regulation of the Navy

*Usually referred to as "the JAG Manual," its correct title was *Manual of the Judge Advocate General of the Navy*. It contained legal administrative matters and material supplementing the *Manual for Courts-Martial*.

Photo courtesy of Col Peter N. Kress, USMC (Ret.)

Peter N. Kress is promoted to the grade of captain by LtGen Frederick L. Wiesman, Commanding General of Marine Corps Schools, Quantico, Virginia. Fourteen months later Capt Kress landed at Da Nang, the first Marine lawyer assigned legal duty in Vietnam.

of the United Colonies were enacted in 1776. During this period, Marines were governed by the Army's Articles of War when serving ashore, and by the Rules for the Regulation of the Navy when serving afloat.[4] Over the next 87 years Congress made six changes to naval law and, in 1862, passed the Articles for the Government of the Navy (25 in number), commonly referred to as "Rocks and Shoals."* With several amendments, Rocks and Shoals remained in effect until 1951. Army law, meanwhile, underwent significant revisions in 1786, 1806, 1874, and 1917.[5]

In 1865 the United States established the position of Solicitor and Naval Judge Advocate General, but Congress abolished the office after the death of the incumbent.[6] Several years later, in 1878, Marine Corps Captain William B. Remey served as Acting Judge Advocate General, until 1880, when Congress passed legislation creating the office of the Judge Advocate General of the Navy.[7] President Rutherford B. Hayes appointed Captain Remey the Navy's first Judge Advocate General, to serve with the grade of colonel while in that billet. Colonel Remey held the billet for the next 12 years.**

Beginnings: Army Courts, Naval Boards

By the end of World War I a three-tiered court-martial system was well-established. In the naval service the lowest level court was the deck court (called a summary court-martial in the Army), a one-officer proceeding, limited to punishment of confinement or solitary confinement for up to 20 days. Bread and water for a similar period was authorized. The inter-

*The term derives from Article XIX, Rules and Regulations for the Government of the Navy, 1862: "If any officer . . . shall, through inattention . . . suffer any vessel of the navy to be stranded, or run upon rocks or shoals . . . he shall suffer such punishment as a court martial shall adjudge." The term came to be applied to those Articles for the Government of the Navy, enumerated in *Naval Courts and Boards*, that were required to be read periodically to ships' crews.

**Colonel Remey's final years found him mentally infirm. He died in a Massachusetts institution in 1894. (Biographical files, Ref-Sec, MCHC).

Marine Corps Historical Collection

Col William B. Remy, U.S. Marine Corps, was appointed the first Judge Advocate General of the Navy.

mediate level court was the summary court-martial (called a special court-martial in the Army), composed of at least three officers. It could impose punishments of a bad conduct discharge, bread and water, and up to 30 days confinement or solitary confinement. The general court-martial in both the Navy and Army was reserved for offenses that, in the convening officer's opinion, were of the most serious nature, meriting more significant punishment. The general court-martial was composed of no fewer than five officers and could impose sentences up to and including death.[8]

The period following World War I brought pressure for change in the military's justice system and set the stage for reforms bringing both streams of military justice, sea and land, into the modern era.[9] During that time convening authorities sometimes appointed members (jurors) to suit their own ends, trial-level reviews were sometimes less than impartial, and lawyers were a rarity in courts-martial. There were no judges, disinterested or otherwise. Meaningful review was virtually nonexistent. Convening authorities could order reconsideration sessions and, indeed, during World War I fully one-third of all Army court-martial acquittals were "revised" to findings of guilty in such reconsideration sessions.[10] Until 1920 a court-martial conviction need only be approved by the officer who convened the court, except in officer dismissal and death cases.

The administration of military justice in the Navy and Marine Corps entailed similar inequities under *Naval Courts and Boards*, the Navy legal manual of the day, and Rocks and Shoals. During this period no lawyers or judge advocates acted as such in the Marine Corps. Neither did the Navy place a particularly high premium on uniformed lawyers. The World War I Navy Judge Advocate General's Office boasted that there was not a single lawyer on its staff.[11] In fact, the Judge Advocate General of the Navy was not required to be a lawyer until 1950.[12]

Akin to the Army's reconsideration session, *Naval Courts and Boards* provided the specific format for the order directing members of a court-martial to reexamine their results with a view to stiffening a sentence:

> 1. The record of proceedings . . . is returned herewith to the court.
>
> 2. The [Navy] department, after careful consideration, is of the opinion that the sentence adjudged by the court is not adequate to the offense found proved . . . .
>
> 3. The court will reconvene for the purpose of reconsidering its sentence.[13]

Such direction made clear what was expected.

Public pressure grew for reform of the Army's justice system. The result was the 1920 Articles of War, the first major legislative revision of Army law since the Revolutionary War, and the guide under which the Army conducted its courts-martial until the Korean War. Although the Navy and Marine Corps' Articles for the Government of the Navy were not similarly amended, a military-wide pattern for change was discernible for the first time.

World War II and Beyond: Military Justice is to Justice as Military Music is to Music

During World War II millions of Americans joined the ranks of the Armed Forces and, in far greater numbers than in World War I, the citizen-soldier again came into contact with military justice. There were about 1,700,000 convictions by courts-martial during the war.[14] Sentences were often harsh and inconsistent with inexplicable verdicts and, too often, overbearing command influence. This reflected, in part, the inexperience of the personnel who comprised the courts and the harsh views of some commanders as to the purpose of military justice. As one antimilitary partisan phrased it:

> No one blushed in admitting that the court-martial was not a trial, that the commander used it to enforce his disciplinary policies and inculcate military values in his men,

> that it was administered by officers alone, that there was no right to review, and that the sentences were calculated to set an example and not to provide justice.[15]

It became apparent that what had worked well enough for the small prewar Armed Services could not bear the stress of major wartime expansion in the modern day. The Marine Corps, for example, was manned at 65,881 on the eve of the war and reached a peak strength of 484,631, an increase of almost 750 percent.[16] Although official Marine Corps records of the number of courts-martial tried were not kept during World War II (nor were they kept until the late-1960s), most were tried without lawyer participation, suggesting the uneven quality of justice that sometimes prevailed during those years.

During World War II the few regular Marine Corps officers with law degrees were assigned to Atlantic or Pacific fleet headquarters or to Headquarters Marine Corps. For the remaining reservist-lawyers on active duty, a law degree was simply an item of passing interest in his field record, like having been to barber's school. Not until mid-1942 was a staff legal advisor first provided for: a captain's billet on the staff of each Marine division.[17] (An Army division, in contrast, was authorized a three-officer judge advocate section of lieutenant colonel, captain, and warrant officer, plus two enlisted clerks.) Otherwise, a law degree only made one assignable to each general court-martial tried in one's battalion; not necessarily viewed as a blessing. Rather than looking to lawyers, commanders divined their legal counsel from hard-won experience and *Naval Courts and Boards*. Of course, having a billet for a staff legal advisor required neither that the billet be filled nor that the incumbent, if any, be a lawyer. Indeed, he usually was not, because lawyer-Marines with career aspirations believed that being sidetracked from a normal career path onto the dead-end legal road (no major's billet for a legal advisor existed) was not the route to either command or promotion. Nevertheless, during the late war years the Marine Corps recognized the utility of lawyers and employed Reserve officers, primarily, to fill its headquarters commands' legal billets. At war's end, by Marine Corps bulletin, officer volunteers were again sought for postgraduate training in law, recognizing the need for more senior, regular officers who could lead the reservist lawyers.[18] The Marine Corps had periodically sought officer-lawyer candidates in that way since after World War I.[19]

With the end of the war unification of the Services was in the air, and pressure again mounted for reexamination of the military system of justice.[20] The American Legion, other veteran's groups, and state bar associations all pressed for change. Studies were initiated and boards convened, all with reform as their goal.

Movement toward change was slow, but legislation moved forward. In 1948 the U.S. Army's Judge Advocate General's Corps was formed despite strong opposition by the Army Chief of Staff, General Dwight D. Eisenhower.* He viewed the divorce of lawyers from the rest of the officer corps as contrary to Service harmony. Since 1862 the Army had assigned "judge advocates" to the headquarters of every field army. Until 1948, however, any commissioned officer could be designated a "judge advocate."[21] In addition to a JAG Corps, the Army's Articles of War were again modernized in 1948. The Navy sought to introduce a companion bill to the Army's, but was unsuccessful. The Navy had waited to see the outcome of the Army's bill and the congressional session ended before action could be taken on the Navy bill. So the Navy and Marine Corps continued to operate under essentially the same Articles for the Government of the Navy, which they had followed for two hundred years.

It was unclear if the 1948 Army modifications applied to the newly established Air Force, formerly a part of the Army. Nevertheless, the Air Force quickly published its own blue-covered *Manual for Courts-Martial* and proceeded to trial. In fact, no military appellate court ever decided whether or not the Air Force properly claimed jurisdiction for itself. The soon-enacted uniform code subsumed the Air Force manual, making it a moot point.

The Uniform Code of Military Justice, 1950: Old Ills Redressed

On 26 July 1947 legislation abolished the War Department and created the Department of the Army and the Department of the Air Force. Those two departments, along with the already existing Department of the Navy, were bunched under the newly

*Although the Army's modern JAG Corps was formed in 1948, the first Judge Advocate of the Army was appointed during the Revolutionary War, on 29 July 1775. In July 1862 the Congress provided for an Army corps of judge advocates. The Army's Bureau of Military Justice, established in 1864, became the Judge Advocate General's Department in 1884, and, on 24 June 1948, became the Judge Advocate General's Corps. (*Military Laws of the United States—1949* [Washington: Government Printing Office, 1950] Sec.62, p. 71-74.)

formed National Defense Establishment, which was redesignated the Department of Defense in 1949.[22] The first Secretary of Defense, James V. Forrestal, took office in September of 1947. He recognized that the recent legislation reforming the Army's court-martial system would soon become law and that it was contrary to Armed Services unification. Secretary Forrestal acted to supersede the one-Service reform and to produce a justice system applicable to all the Services.

He formed another committee, with a particularly ambitious and demanding mandate. He directed the committee to integrate the Army's (and the Air Force's) Articles of War, the Navy and Marine Corps' Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard.* Additionally, the committee was to write a modern code "with a view to protecting the rights of those subject to the code and increasing public confidence in military justice, without impairing the performance of military functions."[23] Secretary Forrestal had set them a formidable task.

Headed by Edmund M. Morgan, the members were Assistant General Counsel of the Department of Defense Felix E. Larkin and the Under-Secretaries of the Army, Navy, and Air Force. Morgan was a highly respected Harvard law professor and, along with Larkin, proved to be the driving force of the committee and its team of supporting lawyers.

In January 1949 the Morgan Committee reported to Secretary Forrestal that it had completed the writing of a uniform code of 140 articles. Three issues remained upon which they could not agree. It fell to the Secretary to make the decision, over Army objection, to adopt a military appellate "Judicial Council" (or Court of Military Appeals, as it was finally designated) of three civilians. The Secretary also approved, despite Navy objection, the seating of enlisted personnel as court-martial members, if requested by an enlisted accused. Finally, a "law officer," who was required to be a lawyer, gained approval, again over the Navy's objection. Although the Army had been employing a "law member" in general courts-martial since 1920, there had been no requirement that he be a lawyer until their short-lived 1948 modifications.

The modern trilogy of summary, special, and general courts-martial was now in place for all Services. For the first time law officers—less than judges but more than senior members—were required to be lawyers. Also, lawyer defense counsel and trial counsel (prosecutors) were permitted at all levels of court-martial, although they were required only at general courts. In addition, any time the trial counsel was a lawyer, the code required that the defense counsel be similarly qualified.

Safeguards against improper command influence, a major concern of the drafters, were woven throughout the new code. Although no system could be made totally immune from misuse, the Morgan Committee, which was well aware of the public's concern regarding past problems, sought "to draw a line between the commander's duty to enforce military law and his power to influence its administration."[24] They acted to preclude future abuses by, among other things, including two new articles making improper command influence a military crime.[25] The capstone of the effort was establishment of the Judicial Council, or Court of Military Appeals, the specialized civilian tribunal empowered to entertain appellate review.[26] Finally, Article 36 of the new Code opened the way for the last aspect of this major overhaul, a new *Manual for Courts-Martial.*

The first Uniform Code of Military Justice was a landmark achievement which brought the military court-martial into the mainstream of contemporary law. The United States Court of Military Appeals, the military's highest court, later said:

> Members of the legal profession within the military establishment are made primarily responsible for the elimination of the abuses formerly affecting military justice, and are relied upon for the establishment of a court-martial system truly judicial in viewpoint, and administered in accordance with established American concepts of jurisprudence.[27]

The Code became law on 5 May 1950.[28] President Truman ordered the 1951 *Manual for Courts-Martial,* which implemented it, into effect on 31 May 1951, repealing the Articles for the Government of the Navy, the Articles of War, and the Disciplinary Laws of the Coast Guard.**[29] The *Manual* specified that from that

*The United States Coast Guard, a separate military service since January 1915, first employed the Disciplinary Rules for the Revenue Cutter Service as its disciplinary tool, later adopting the Disciplinary Laws of the Coast Guard. In November 1941 it began operating as part of the U.S. Navy for the war's duration, and came under the Articles for the Government of the Navy. At the war's conclusion it again utilized its Disciplinary Laws until the 1950 UCMJ became effective. (50 CMR ix, 1975.)

**In 1955 the first JAG Manual, then known as the *Naval Supplement to the Manual for Courts-Martial, United States, 1951,* was published for the use of Navy law specialists and Marine Corps lawyers. It was six by nine inches in size and cost ten cents.

date Army and Air Force lawyers could be appointed "judge advocates." Navy and Coast Guard lawyers, it said, were to be "law specialists." Marine Corps lawyers, however, went unmentioned in the new manual.[30] This, presumably, was because the drafters assumed the Navy would provide Marines their legal counsel, as it did their chaplains and doctors. The failure to appreciate and provide for the fact that the Corps would want its lawyers to come from its own ranks was to have considerable effect. Over the next 10 years, until Marine Corps lawyers were given their own career pattern, it affected the promotions and careers of Marine Corps lawyers, senior and junior, who would find themselves in Vietnam courtrooms. But in 1951, named in the Code or not, lawyers became a fact of everyday Marine Corps life.

Continuing Tension: Justice Versus Discipline

Despite the barbs of critics, the phrase "military justice" was no longer a contradiction in terms. Still, until the modest amendments of 1920 and the major reform of 1950, discipline had prevailed while justice stood in shadow. As a 1945 editorial in the *Chicago Tribune* read:

> Martial law was drafted in different times, for a different kind of soldier to the one who wears the United States uniform today. The professional soldier of a century or more ago was recruited, as often as not, from the dregs of society. When a weapon was placed in his hand the most savage discipline was required to insure that he did not turn it against those whom he was enlisted to protect. Such a code is neither necessary nor desirable to govern civilians in uniform defending a free country of which they are free citizens.[31]

The reforms of 1950 reflected the continuing question of the purpose of military law: is it to enforce discipline or to insure justice? Or both? Can both ends be simultaneously served? If so, in what order?

Until 1950 the commander had great influence over courts-martial. Trial procedure was simple, requiring no legal training or experience to employ it. Review procedures lent themselves to quick confirmation of verdict and sentence. In this way discipline was enforced by demonstrating to all the swift punishment of infractions. The influence of the commander was not lightly surrendered, nor the military lawyer eagerly received. General William Tecumseh Sherman, himself a lawyer, earlier stated from the commander's perspective:

> It will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisdiction.[32]

Marine Corps Colonel Olin W. Jones recalled "the enmity of virtually all Marine Corps commanders to the new system. This was the first time they had to be told they could not do many things they had done in the past . . . . This transition period was difficult for many of us."[33]

In the 1950 UCMJ the balance between discipline and justice was apparent. The commander would appoint counsel, members, and law officer, and have first review of the case. Lawyers would conduct the pretrial investigation and guard against baseless charges. The law officer would ensure a trial according to law. His performance and the record of trial, as a whole, would be subject to review not only by the commander, but by a military appellate panel. A second, final appellate review would be in the hands of the all-civilian Court of Military Appeals. Apropos of the court-martial which the new Code ushered in, trial attorney F. Lee Bailey, himself a former Marine Corps legal officer, wrote: "The [civilian jury] system simply can't be counted on. In my opinion, despite all the criticism leveled at the military, the odds are that a military court will produce a more accurate verdict in a disputed issue of fact than a civilian jury."[34]

The Death Penalty in the Armed Forces: Yes But No

In 1817 William Boyington, U.S. Marine Corps, was executed by a firing squad, the last Marine to be put to death pursuant to the sentence of a court-martial. His offense goes unrecorded, but during that period the death penalty was reserved for mutiny, desertion, and murder. According to the sketchy and incomplete records of the era, three other Marines were certainly executed before Boyington, and another three probably were.

There has not been an execution in the U.S. Navy since 1849 when two seamen were hanged from a ship's yardarm as a result of a mutiny on a smallboat from the U.S. Survey Schooner *Ewing*. (Their conviction followed a spirited defense by a prominent civilian defense attorney, paid for by the Navy.) Prior to the *Ewing* hangings, five other sailors were certainly executed and another three probably were. Among the five known to have been executed, three were alleged mutineers of the brig-of-war *Somers*, hanged from the yardarm after a summary proceeding in 1842. One of the three was Midshipman Philip Spencer, son of a former Secretary of War, which led to the "*Somers* Incident" becoming a *cause celebre*. As a result of the executions the captain of the *Somers*, like the com-

modore who authorized hanging the *Ewing* mutineers, was himself tried by a court of inquiry. The commodore was suspended from duty for five years; the *Somer's* captain was exonerated. Since those nineteenth century executions, a number of sailors and Marines have been condemned to death whose sentences were commuted to a lesser punishment.[35]

In the U.S. Army 270 soldiers were executed prior to World War I. During World War I 35 more were executed, and during World War II 146 death sentences were carried out. (Two soldiers of that number were executed after the war as a result of sentences imposed during the war.) Since implementation of the Uniform Code of Military Justice in 1950, the Army has executed 10 soldiers, the last in 1961 for the rape of an Austrian child.[36] The U.S. Air Force executed three men in 1948 and another two in 1954.[37] There has not been a death sentence carried out by the U.S. Coast Guard.

The stark difference in the number of executed death sentences in the Army and the naval service was due to dissimilar procedures for approving them in the naval services' Articles for the Government of the Navy and the Army's Articles of War. Under the Articles of War commanding generals of armies in the field in time of war were empowered to order death sentences carried out. The Articles for the Government of the Navy, on the other hand, required approval by the President of the United States of any sentence to death, except in very limited situations. With enactment of the UCMJ in 1950, approval procedures were made uniform, and Presidential approval is now required before a death sentence can be carried out in any armed service.

Since the last military execution in 1961 there have been numerous court-martial sentences to death, but as of this writing, all such sentences that have been ruled upon have either been mitigated to lesser punishments or reversed by military appellate courts. Since 1986 the Army's prescribed method of execution, although never put to use, has been lethal injection. The naval service has not prescribed a method of execution.*

Before a court-martial may sentence a convicted serviceman or woman to death, the *Manual for Courts-Martial* must authorize death as a penalty for the offense, the officer referring the case to trial must specifically authorize the court to consider death as a possible punishment, and the members must unanimously sentence the convicted individual to death. Other procedural steps complying with current U.S. Supreme Court opinions are mandated by Court of Military Appeals decisions.

*Rule for Court-Martial 1113(d)(1): "A sentence to death which has been finally ordered executed shall be carried out in the manner prescribed by the Secretary concerned."

Marine Corps Lawyers: From The Line to Discipline Branch

Under the late Articles for the Government of the Navy there was no requirement for lawyers in a Marine Corps general court-martial. The commander simply could detail an officer to be the judge advocate (prosecutor), a "suitable officer" to be defense counsel, and five members and try the accused.[38] Until 1920 (in the Army), a conviction only needed approval of the officer who convened the court for the sentence to be executed, except in cases of officer dismissal or a death sentence. But in 1950, the Marine Corps and the other services realized that the new UCMJ would require a great many lawyers to meet its requirements. Now the Marines had to survey those within its ranks who were law-trained but laboring in other orchards, as well as locating regular officers who wanted to become lawyers. In the next few years the Marine Corps found exemplary officers to meet the new challenge.

Colonel Hamilton M. Hoyler, for example, was an infantry and artillery officer, as well as a Harvard Law School graduate. In World War II he saw action on Tulagi and earned the Silver Star Medal on Guam, where he commanded a battalion. He was awarded the Purple Heart for wounds received on Bougainville while a member of the 3d Raider Battalion. During the Korean War he commanded the 5th Marines and, before heading the Marine Corps' Discipline Branch in 1961, served as chief of staff of the 3d Marine Division.[39]

Major James F. Lawrence, Jr., had been an infantry platoon commander on Guadalcanal and Cape Gloucester. In Korea he was awarded the Navy Cross for his leadership of an infantry battalion during the breakout from the Chosin reservoir. He gained his law degree in 1953 and later became the first officer promoted to the grade of brigadier general as a lawyer.

Major Duane L. Faw held two Air Medals, earned as a dive-bomber pilot in combat over Guadalcanal, Munda, Rabaul, and other World War II Pacific islands. He later was the first brigadier general Director of the Judge Advocate Division.

Major Joseph R. Motelewski held a law degree when he was commissioned in 1942. As a motor transport

officer he saw combat on Guadalcanal and Peleliu. In Korea he briefly commanded the 1st Battalion, 7th Marines. In Vietnam he would be the chief of staff of the 3d Marine Division.

These men, and others, exemplified the Marine Corps tenet that every Marine is a rifleman. Commandants and commanders wanted their newly highlighted legal officers to be regular, as opposed to Reserve, officers with line experience and preferably with command experience. Such a background provided an advocate with insight into the problems of both the commander and the enlisted Marine. But it proved difficult and, finally, impossible to meet the desire for lawyers with such qualifications.

Since the end of World War I the Marine Corps had detailed a few officers each year to duty as law students, ordering them to civilian law schools. During the 1920s and 30s it was Harvard University's School of Law from which Marine Corps officers often graduated.[40] During World War II the program languished, but thereafter several majors were sent each year to law school with full pay. The post-war program, which placed officers at George Washington, Georgetown, or Catholic Universities, all in Washington, D.C., was in full force in 1950 in anticipation of the UCMJ's requirements for lawyers.[41] Marine Corps law students were required to purchase their own books and to assume duties in the office of the Judge Advocate General of the Navy during school breaks and vacations. Army, Air Force, and Coast Guard law students had no similar requirements. Major Earl E. Anderson, a student at George Washington University's law school from 1949 to 1952, recalled that "many of us had full-time [military] jobs . . . . For example, for over a year, I was the Foreign Claims Officer for JAG, handling all foreign claims."[42] After 1952, largely due to Major Anderson's petitioning the Judge Advocate General of the Navy on the matter, naval service law students were no longer required to simultaneously mix law study and military duty, or to spend school breaks in the office of the Navy JAG. During the 1950s the graduating officer received a secondary military occupational specialty (MOS) designator of 0185, trial/defense counsel, upon passing a state bar examination.

The assignment of a secondary, rather than a primary MOS, after three years of specialized and expensive civilian schooling, was significant. It reflected a philosophy that legal work was the graduate's secondary job, his primary duty remaining infantry

Department of Defense Photo (USMC) 311245

Gen Clifton B. Cates, 19th Commandant of the Marine Corps, was a second lieutenant in France during World War I, a year after graduating from law school.

command, or flying, or whatever his pre-law school specialty had been. Every Marine a rifleman. It also put the lawyer who was a regular officer in a difficult position.

In the years between World War II and Vietnam, a law degree, combined with command experience, was recognized as a positive factor in gaining promotion—not necessarily to employ as one's primary duty, but as an indication of drive, ambition, and ability. Indeed, until 1967 when James Lawrence was promoted to brigadier general, only three of the eight serving or future general officers who had law degrees—Cates, Anderson, Wensinger, Twining, Axtell, Beckington, Kier, and Snedeker—ever practiced

law in the Marine Corps, or anywhere else.* Yet in the 1950s, the Marine Corps fostered an approach of specialization without application by creating lawyers on the one hand, while branding their specialty as secondary on the other. The Marine Corps lawyer with career ambitions recognized that he should try to remain in his former nonlegal specialty and, more importantly, obtain command of a unit.** That outlook squared with Headquarters Marine Corps' view that legal expertise was needed, but only as a specialized skill for the commander to call upon when necessary.*** The Marine Corps looked for a solution to the issue of traditions versus specialization. Is every Marine, including the lawyer, a rifleman? The Marine Corps found the answer in Vietnam.

During the 1950s and 60s the legal community was also securing its position in the command structure of the Marine Corps. After World War II, lawyer assignments were not tracked or controlled in any formal way, there being no reason to be concerned with attorneys. With the advent of the UCMJ and its mandate for lawyers, concern became a necessity.

Gen Holland M. Smith, seen in 1919 as a major in France, graduated from law school in 1903 and practiced in Alabama before being commissioned in 1905.
Department of Defense Photo (USMC) 515291

*General Clifton B. Cates, 19th Commandant of the Marine Corps, was a 1916 University of Tennessee law school graduate. He retired from the Marine Corps in 1953. General Earl E. Anderson was a lieutenant colonel when he graduated from George Washington University's school of law (as law review editor-in-chief) in 1952. For the next 12 years he mixed legal and aviation duties then, until his retirement in 1975, was an aviator and a senior staff officer. Lieutenant General Walter W. Wensinger was a 1917 University of Michigan law school graduate before joining the Marine Corps and, other than duty in the Office of the Navy JAG for three years, was a career infantry officer. General Merrill B. Twining, a 1932 graduate of George Washington University's law school, was a career infantry officer. Lieutenant General George C. Axtell was a career aviator who graduated from George Washington University's law school as a major in 1952. Lieutenant General Herbert L. Beckington, an artillery and infantry officer, graduated from Catholic University law school in 1953, as a major. Major General Avery R. Kier was a 1927 graduate of Kansas City School of Law, but was a career aviator. Brigadier General James Snedeker, an infantry officer, was a 1940 law school graduate who represented the Marine Corps and the naval service on numerous boards and committees relating to military law, and was the first Marine to hold the billet of Deputy Judge Advocate General of the Navy. In an earlier era, General Holland M. Smith, who retired in 1946, was a graduate of the University of Alabama's law school, and practiced, briefly, before entering the Marine Corps. (RefSec; and Gen Anderson ltr to author, dtd 22Feb89; Anderson folder, Marines and Military Law in Vietnam file, MCHC).

**After World War II, when the postgraduate law program was curtailed for several years, Congress became concerned over the number of new lawyers who were returning to their pre-law school military specialties without practicing that which had been paid for with public funds. Additionally, General Earl E. Anderson recalls that Navy law specialists lobbied Congress for an end to Marine Corps participation in the law program because of dissatisfaction that their JAG and deputy JAGs remained line officers, rather than members of a JAG corps. (Gen Anderson ltr to author, dtd 22Feb89, Anderson folder, Marines and Military Law in Vietnam file, MCHC).

***As late as 1964, the Commandant of the Marine Corps, General Wallace M. Greene, Jr., expressed that view when he said, "We want Marine lawyers to vary their legal duties with command and staff assignments because we feel they make better military lawyers as a result." (*The Army, Navy, and Air Force Journal and Register*, 4Jan64, p. 13.)

Legal matters were conducted by Discipline Branch (usually referred to by its Headquarters designation, "Code DK"), a part of the Personnel Department of Headquarters Marine Corps. Although Discipline Branch had existed during World War II, not until the Uniform Code of Military Justice became effective was Discipline Branch headed by a lawyer.* The first attorney to be designated head of Discipline Branch was Colonel James C. Bigler, who had been assigned to the branch since 1949. Successive branch heads were Colonels St.Julien R. Marshall in 1952, Paul D. Sherman in 1954, and John S. Twitchell in 1956. As lawyer identification, assignment and utilization became routine, Discipline Branch, or Code DK, evolved into a branch concerned solely with legal matters.

In the late 1950s the Commandant found it difficult to meet the requirements for junior officer-lawyers. The Marine Corps had 129 officer-lawyer billets, filled primarily by Reserve officers augmented by a few senior, regular officer-lawyers who alternated between legal and nonlegal assignments. Lawyer shortages were a continuing problem. To resolve that problem, in 1959 the Commandant proposed establishing a new, primary MOS for lawyers who desired to perform only legal duties. He also proposed safeguards against promotion discrimination and sought more reservists to meet the expanding requirement for lawyers. He hoped to avoid a separate legal corps, such as the Navy was proposing.[43] By Marine Corps order Reserve lawyers were soon being recruited as candidates for regular commissions.[44] Within two years 0185 (trial/defense counsel), and 0195 (law officer), became primary MOSs, assigned upon graduation from law school and the passing of a state bar examination, and lawyers were assured equality of promotion opportunity.**[45]

That was the situation on the eve of the Marine landings at Da Nang in March 1965. The U.S. Army's JAG Corps had existed since 1948. The Air Force employed a de facto JAG Corps while claiming opposition to a separate category of lawyer-officer. The Navy was seeking legislation providing for its own JAG Corps, but the Marines opposed it because the intended legislation precluded a Marine from again becoming the Judge Advocate General of the Navy, no matter how remote such a possibility was.[46] (The Navy had to wait until 8 December 1967 for its lawyer-officers to become a JAG Corps.)[47] The Marines, while complaining that one of their own could not be Navy JAG, insisted that a Marine Corps JAG corps was neither needed nor desired.

In Support: Navy Lawyers

In 1942 the Naval Courts and Boards Training Course was established at the Advance Base Receiving Barracks, Port Hueneme, California. It was the naval services' first legal school attended by both Navy and Marine Corps personnel. In April 1946 a seven-week training course for Navy yeomen and Marine legal clerks was added to the curriculum, and in February 1950 the school, now redesignated the U.S. Naval School (Naval Justice), was relocated to the Naval Base, Newport, Rhode Island. It was again redesignated in May 1961, this time as the Naval Justice School.

In 1965 Navy lawyers were properly referred to as "law specialists." Confusingly, law specialists could also be staff judge advocates, if assigned that specific billet on the special staff of a commander. The title "staff judge advocate" was a carryover from the period before the UCMJ, when the senior officer in a legal billet on the commander's staff was referred to as the "staff judge advocate," whether he was a lawyer or a layman. Marine Corps lawyers remained unmentioned and untitled in the UCMJ. Nevertheless, as with their Navy counterparts, if they served in a legal billet, they were commonly, if inaccurately, called "judge advocates."

The UCMJ's omission of the Marine Corps lawyer had an effect on a more substantive level. Records of court-martial proceedings must be reviewed for legal sufficiency and correctness. Cases involving significant punishment, as defined in the Uniform Code, required review by appellate courts. The 1950 UCMJ specified that the records of some lower-level courts, summaries and specials that did not include a bad conduct discharge as a part of the sentence, need not go to the appellate level. They did, however, require review for legal sufficiency and correctness by a law specialist or judge advocate. Marine Corps lawyers, not being classified as either, were in the position of prosecuting significant numbers of courts-martial while lacking the authority to review many of them. The solution was for the Navy to assign a law

*Before 1941, legal issues arising in the field, few as they were, were an aspect of the personnel officer's duties. Courts-martial and legal matters were first mentioned in Headquarters Marine Corps' organization in 1941 when the Personnel Department formed a Courts and Boards Branch. Courts and Boards evolved into Discipline Section, then Discipline Division, and finally, Discipline Branch, which continued in existence until the Judge Advocate Division came into being on 17 April 1968. (RefSec, MCHC).

**In 1964 the 4405 MOS designator was first assigned Marine Corps lawyers. (LtCol Brian B. Kent ltr to author, dtd 28Feb89, Comment folder, Marines and Military Law in Vietnam file, MCHC).

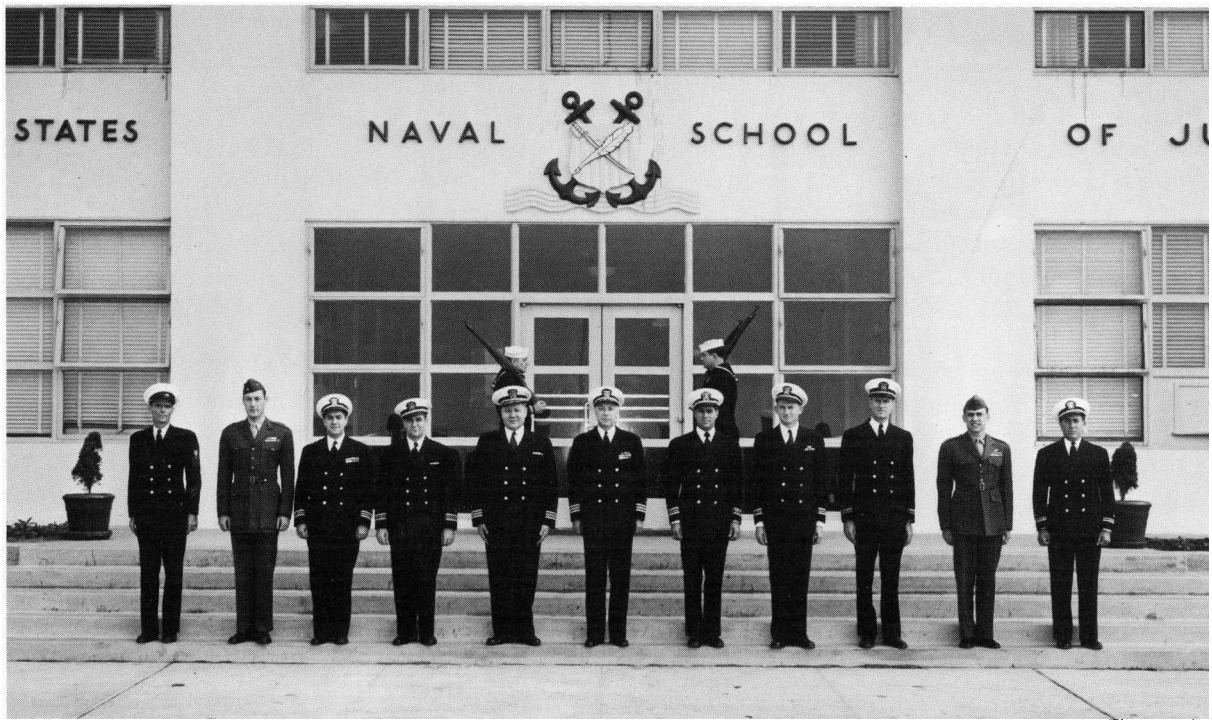


Photo courtesy of Col Robert C. Lehnert, USMC (Ret.)

The staff of the Naval School of Justice, Port Hueneme, California, March 1948. 1stLt Robert C. Lehnert, second from right, was the school's first Marine Corps instructor though not yet a lawyer. In 1967 he became Staff Legal Officer of the 1st Marine Aircraft Wing in Da Nang, Vietnam. His relief at the School of Justice was Capt William A. Murphy, USMC, second from left. Navy Lt (later Capt) Wyman N. Jackson, third from right, was a law officer in Vietnam during 1966 and 1967. The school's commanding officer, Cdr (later RAdm) Frederick Albrink, center, later was Assistant Judge Advocate General of the Navy.

specialists, who were authorized to conduct the required review, to all major Marine commands that convened courts-martial. The Navy was glad to accommodate the Marines, because such assignments offered Navy lawyers a broader exposure to military justice practice. In exchange, Marine Corps lawyers in roughly equal number were assigned to Navy legal offices and the appellate sections in the Office of the Judge Advocate General of the Navy.[48]

The Navy sought legislation, with Marine Corps concurrence, to amend the UCMJ to permit review of all court-martial records by "any qualified officer lawyer of the Navy or the Marine Corps, whether or not he is designated as a law specialist."[49] But in March of 1965, when the Vietnam landings occurred, passage of that amendment was several years away and the Marine Corps relied on Navy lawyers to help man its legal offices. At the same time, Headquarters Marine Corps continued to hold that Marine Corps lawyers remained unrestricted officers who could serve in any billet. By fiat, every Marine was still a rifleman.*

In Washington disagreement continued between the Marine Corps and the Navy's Judge Advocate General's office over the establishment of a Navy JAG corps. The Marines still opposed legislation offered by the Navy that would create a Navy JAG corps, now because the Navy would not include provision for a Marine Corps Assistant Judge Advocate General of the Navy, a rear admiral/brigadier general billet.[50] (The

*During this period, acceptance of a primary legal MOS was still optional for regular officers. Lawyers commissioned prior to 1961 had primary MOSs other than legal. Another Marine Corps order decreed that "when there is a sufficient number of lawyers to meet the needs of the Marine Corps, those officers not assigned a primary legal MOS will be detailed to assignments other than legal . . . in accordance with the requirements of the Marine Corps." (Headquarters, U.S. Marine Corps, Division of Information, Service Information Release, Release No. RWJ-67-63, 29Mar63; and MCO 1040.21, dtd 26Dec62, Subj: Marine Corps Lawyers; policy concerning, Para 3.b(3); 4400 MOS Establishment folder, Marines and Military Law in Vietnam file, MCHC).

Marines had given up their insistence that language be included in the legislation to provide for the possibility of a Marine in the top billet, Judge Advocate General of the Navy.) This conflict, though without impact on Marine Corps lawyers in Vietnam, raised basic issues. For example, in the Navy legal community it was suggested that there should only be one "law firm," and it should wear a blue suit; that is, be composed entirely of Navy personnel.[51] Eventually, the Marine Corps itself was to ask if that might not be the wiser course.[52]

In Support: Headquarters Marine Corps

Critical to Marine Corps lawyers in Vietnam was the support of those in charge of legal matters at Headquarters Marine Corps. Since the UCMJ had gone into effect, the number of Marine Corps lawyers had grown significantly. Headquarters' Discipline Branch continued its evolution within the Personnel Department. In the branch's Navy Annex offices plans were formulated for eventually moving from Personnel and making "legal" a separate division. Colonel John S. Twitchell and his successors, Colonels Hamilton M. Hoyler, Robert A. Scherr, and Robert B. Neville, laid the groundwork for the future Judge Advocate Division during their tenures in Discipline Branch, from 1956 to 1966.[53]

The problems they faced were daunting. Should lawyers be assigned only legal duty? If so, that would reduce the number of lawyers required and probably ensure "green suit" (Marine), rather than "blue suit" (Navy) lawyers. Legislation to this effect was proposed in 1958, but then withdrawn for fear of establishing a single-skill, JAG-type corps in the Marines. Instead, in 1962, a Marine Corps order established the compromise policy that regular officers would not have to perform solely legal duties if they did not wish to, but could if they wanted; on the other hand, Reserve lawyers (usually captains and lieutenants) could serve only in legal billets. A later modification established the policy that lieutenant and captain lawyers would serve one tour of duty out of three in a nonlegal billet. Presumably, this would ensure that every Marine would continue to be a rifleman.[54] Another issue was the lawyers' continuing concern that they might not receive consideration by promotion boards equal to that of line officers.* In 1964 that, too, was addressed by Marine Corps order.[55] Further, to be on a par with the other services, Marine Corps lawyers sought credit for the time spent in law school preparing for the specialized duty they performed. Such "constructive service" would be significant when promotion eligibility was considered, because the practical effect would be that lawyers would be promoted to captain with less time on active duty than nonlawyer officers.

Without constructive service, not only was there a lack of recognition for the effort and time spent preparing to become a service lawyer, but disparities in grade could arise between lawyers. Captain W. Hays Parks, for example, initiated his service while still a college undergraduate. He arrived in Vietnam seven years later, a captain with seven years time in service. Although he had not been on active duty, he had been advanced in grade throughout the seven years he had been in college and law school. His law school classmate, Jerald D. Crow, was commissioned upon graduation from law school, and arrived in Vietnam at about the same time as Captain Parks. Without constructive service, and because of his later commissioning date, Crow was a second lieutenant receiving little more than half the pay that Captain Parks did.[56] Constructive service would have put the two officers, who had equal time actually in uniform, on a par, rather than essentially rewarding Parks for merely having signed his service contract earlier. Legislation was proposed to meet the constructive service issue, but it remained unresolved for several more years.

The number of lawyers being commissioned in the Marine Corps was not sufficient to meet the needs of a Service expanding to meet the Vietnam War. Nor did the pressure of the draft entirely close the lawyer manpower gap. A solution came in 1961, when a traditional source of officer accessions, the Platoon Leaders' Class (PLC), was expanded to embrace law student candidates as well as undergraduates who intended to pursue a law degree following graduation.[57] The PLC (Law) program allowed prospective officers between college graduation and law school to be commissioned as second lieutenants. Previously this route had been open only to graduating college seniors who could immediately begin Marine officer training. The PLC (Law) program, by committing lawyers to Marine Corps service before law school, addressed the shortage of lieutenants and captains. However, the continuing paucity of midlevel lawyers, majors and lieutenant colonels, was a retention problem which was to burden the Marine Corps for the entire war.

*A "line officer" is an officer assigned to the combat arms of the service involved. In the case of the Marine Corps those are infantry, artillery, armor, and engineer officers; as opposed to staff, service, and specialist officers.

Solutions to the problems were hammered out. Lawyers soon were assigned legal duty almost exclusively; the Commandant directed parity in promotions; and law school graduates were to receive constructive service. Those resolutions and their implementation were the result of long planning, intense effort, and inspired staff work. The officers in Discipline Branch in the late 1950s and early 1960s made the UCMJ a practical and workable system of military justice in the Marine Corps.

Among those matters upon which they advised the Commandant was the legal status of those Marines who were to land in Vietnam: invaders or invitees?

The Pentalateral Agreement: Diplomatic Riflemen

Few Marine riflemen in Vietnam knew that in terms of legal jurisdiction they were considered to be diplomatic mission clerks.

A basic tenet of international law is that the courts of a country have jurisdiction to try all cases arising out of wrongful acts committed in that country. With Vietnam's permission the United States could, in Vietnam, try U.S. citizens for wrongful acts committed in Vietnam, or lacking permission, the trial could be held elsewhere. But generally, a sovereign state has primary jurisdiction over all persons within its territory. This includes the military personnel of another nation, unless the host state consents to surrender its jurisdiction.[58]

The United States, naturally, desired to retain the greatest possible measure of jurisdiction over its own forces in Vietnam. In time of peace jurisdiction is a matter for negotiation with a host country, formalized in a status of forces agreement, or SOFA.*

Usually a SOFA is not concluded when one nation is engaged in a war on the soil of another nation. Moreover, in Vietnam government courts were still functioning and, according to international law, those courts retained primary jurisdiction over American troops in Vietnam. Clearly, an accord regarding jurisdiction was needed.

The Agreement for Mutual Defense Assistance in Indochina, commonly referred to as the Pentalateral Agreement, was concluded long before the 1965 landings, and resolved the issue of jurisdiction. That document, governing the legal status, rights, and obligations of American personnel in Vietnam, was signed in Saigon by the United States, France, Cambodia, Laos, and Vietnam on 23 December 1950. Although similar to mutual defense assistance agreements the United States had concluded with other allies, the Pentalateral Agreement was brief (less than six pages long), and its terms were broad and general, leaving many legal questions to be settled on a case-by-case basis.

The agreement provided that all American forces entering Indochina were to be considered members of the U.S. diplomatic mission with the same legal status as actual members of the U.S. mission of corresponding grade. American military personnel were divided into three categories: senior military members of the U.S. mission with full diplomatic status; a lesser, undefined category which, significantly, excluded its membership from the civil and criminal jurisdiction of Vietnam; and the third category, whose membership was again undefined, but with the legal status of clerical personnel of the diplomatic mission. In 1958, the United States advised the Vietnamese government that it would consider top U.S. military commanders to be in the first category, officers and warrant officers to be in the second, and enlisted men to be in the third category. So, in diplomatic terms, Marine riflemen were considered diplomatic mission clerks. Major General George S. Prugh, Judge Advocate General of the Army, wrote:

> When the pentalateral agreement was signed in 1950, the signatory parties obviously meant the agreement to apply to the activities of the small U.S. Military Advisory Assistance Group staffs operating at the time in Cambodia, Laos, and Vietnam. During the early 1950s, there were 200 to 300 of these military advisors . . . . It is unlikely that the diplomats ever imagined that its simple provisions would govern the legal status and activities of almost 600,000 Americans in Vietnam. Yet . . . no more detailed agreement was ever negotiated.[59]

As Major General Prugh pointed out, once large numbers of American forces were in the country, they were immediately engaged in combat, and a status of forces agreement, a peacetime document, never became necessary. The Pentalateral Agreement provided a minimal but adequate framework, and the generality of its provisions allowed a flexibility that proved valuable in meeting the many legal complications that were to arise.[60]

The legal status of American civilians in Vietnam, other than the actual diplomatic mission, was not ad-

*The concept of a SOFA first arose in 1941, when the United States leased bases in Great Britain in exchange for destroyers. The concept was "perfected" in the North Atlantic Treaty SOFA of 1951. (Burdick H. Brittin, *International Law For Seagoing Officers* (Annapolis: Naval Institute Press, 4th ed., 1981), pp. 187-193.

Department of Defense Photo (USA) SC-613296

LtCol Paul J. Durbin was Deputy Staff Judge Advocate, U.S. Army, Pacific, when selected for temporary duty in Saigon in June 1959, the first Armed Service lawyer to be assigned legal duty in Vietnam.

dressed when the Pentalateral Agreement was reached. Eventually, 10,100 civilians would be in Vietnam, committing their share of criminal offenses, so their legal status and amenability to trial was no small issue. In 1965 military dependents, contractor employees, merchant seamen, reporters, and businessmen, were not considered by the American military legal system in Vietnam. Marine Corps lawyers would later be closely involved in the question of whether American civilians were subject to court-martial jurisdiction.

Military Law Comes to Vietnam

President Truman ordered the establishment of a U.S. Military Assistance Advisory Group (MAAG) in French Indochina, to provide materiel support to the French Expeditionary Corps fighting there. Lieutenant Colonel Victor J. Croizat, the first Marine Corps advisor to serve in Vietnam, arrived in August 1954.[61] Five years later, in June 1959, Lieutenant Colonel Paul J. Durbin, U.S. Army, was the first military lawyer assigned to Vietnam. He and five successor Army lawyers served on the staff of the U.S. Army Element, MAAG, in Saigon before Captain Pete Kress, the first Marine assigned exclusively for legal duty in Vietnam, arrived in March 1965.[62]

Beginning in May of 1961, volunteers from the 3d Marine Division, on Okinawa, and the 1st Marine Aircraft Wing, at Iwakuni, Japan, went to Vietnam as advisors for 30-day periods. In April 1962 a Marine helicopter squadron deployed from Okinawa to an old Japanese-built landing strip near Soc Trang. It supported forces of the Government of Vietnam battling Communist guerrillas. The squadron and its supporting establishment, known by the codename Shufly, moved from Soc Trang to Da Nang five months later. The French had rebuilt Da Nang's civilian airfield as a military base following World War II. The airbase, surrounded by the city itself, was relatively modern and was occupied by Vietnamese and U.S. Air Force units. It served the city as a commercial airport, as well as a military airbase.[63]

Marine Corps lawyers stationed in Japan and Okinawa noted that units were deployed in combat and considered how they also might get to where the action was. First Lieutenant Robert J. Blum, on temporary additional duty with Marine Aircraft Group 11 at P'ing-Tung, Formosa, convinced his commanding officer that the Marines at Da Nang were in need of legal assistance. (Legal assistance is the military term for counsel on virtually any legal matter other than military justice, e.g., indebtedness, divorce, taxes, adoption, to name but a few.) On 18 April 1963, Lieu-

The Da Nang Airbase was closely surrounded by the city of Da Nang. 9th MEB Headquarters and Capt Kress' office lay just to the left of the runways.

Department of Defense Photo (USMC) A423023

Courtesy of Col Robert J. Blum, USMC (Ret.)

1stLt Robert J. Blum was in Da Nang on 18 April 1963 to provide legal assistance for Shufly Marines almost a year before the 9th Marine Expeditionary Brigade landed.

tenant Bob Blum became the first Marine to reach Vietnam as a lawyer, and provided legal assistance for three days to the Shufly Marines. Although he did provide a service to the aviation unit, in truth, he said, he wrangled his way in-country "mostly just to see what was going on." Three months later he was again directed to Da Nang, this time to conduct a pretrial investigation.[64]

Two months after Lieutenant Blum's Vietnam visit, in June 1963, Colonel Earl E. Anderson arrived at MAAG Headquarters in Saigon to assume duties as chief of staff of the MAAG. Since attainment of his law degree in 1952, Colonel Anderson had been the staff legal officer of the 3d Marine Aircraft Wing, in addition to commanding several aviation units.* In Vietnam, Colonel Anderson served as chief of staff of the MAAG for the next year, while also flying more than 40 combat missions.[65]

A few other Marine Corps lawyers were in Vietnam before the 9th MEB landed in March 1965. Major Brian B. Kent went ashore at Da Nang in September or October 1964 as counsel to an investigation conducted by the 1st Marine Aircraft Wing inspector. There had been reports that helicopter extractions had been negligently delayed, resulting in casualties to the South Vietnamese and their U.S. Marine Corps advisors. Major Kent remained in Vietnam for a week. The investigation determined that the delays had resulted from an insufficient number of available aircraft.[66] Major Paul F. Henderson, Jr., accompanied other members of the 9th MEB staff to Shufly headquarters for a week-long period in August 1964.[67] A few weeks before the Marine landings the staff legal officer of the 3d Marine Division, Colonel Olin W. Jones, accompanied the division commanding general on a liaison visit to Da Nang and Hue, as well.[68]

On the day of the initial 1965 Marine Corps landings, when Captain Pete Kress arrived for duty, Navy law specialist Lieutenant Hugh D. Campbell was already ashore at Da Nang. He was on temporary duty from the 3d Marine Division and provided income tax legal assistance to Shufly personnel.[69] The Navy and Marine Corps joint legal support for Vietnam Marines

*Colonel Anderson had no further assignments in the legal field. After billets including Commanding General, Fleet Marine Force, Atlantic, and Assistant Commandant of the Marine Corps, he retired in 1975 as a general.

represented by Captain Kress and Lieutenant Campbell was to continue throughout the war and beyond.

A Beginning

On 8 March 1965 when Captain Kress stepped from the C-130 that had brought him to Da Nang, there were 168 lawyers in the Marine Corps.* Only 83 of them were regular officers. Forty-five percent of them were majors or above — an inordinately high percentage of supervisory officers. But the stage was set for trials in a combat zone.

*Of this number 19 were colonels, 34 lieutenant colonels (including the sole woman lawyer in the Marine Corps, LtCol Lily H. Gridley, a non-deployable reservist who was the long-time legal assistance officer at Headquarters Marine Corps in Washington), 25 majors, 20 captains, 60 first lieutenants, 9 second lieutenants, and a CWO-2 who had first enlisted in 1935. Two colonels and a major were lawyers but did not practice law in the Marine Corps. (HQMC, Code AI, Directory of Marine Officer Lawyers, dtd 1May65; Directories folder, Marines and Military Law in Vietnam file, MCHC).

Marine Corps Historical Collection

Gen Earl E. Anderson, here a colonel, received the Legion of Merit with Combat "V" on 15 October 1964 for service with the MAAG in Saigon. In 1952 he was editor-in-chief of the George Washington University law review and graduated with highest honors.

CHAPTER 2

1965: 3d Marine Division and 9th MEB Open Shop

From a Lawyer's Case File: One Homicide, Two Victims—Trying Cases—III MAF: Headquarters Without Lawyers 1st Marine Aircraft Wing: Touching Down—Legal Duty in a Combat Zone: Problems—From a Lawyer's Case File: The Marine Corps' First War Crime Conviction in Vietnam—Perspective

Captain Peter N. Kress, acting Staff Legal Officer (SLO) of the newly arrived 9th Marine Expeditionary Brigade (MEB), discovered that he was less than overworked. In fact, his earliest employment of any significance was as the civil affairs officer, his secondary assignment.

Rats infested the old French compound that was now the MEB headquarters and billeting area. The question put to the legal-cum-civic action officer was how best to end this situation; traps or poison? Presumably Captain Kress fell heir to the problem because of the potential impact that poisoned rats might have upon the surrounding Vietnamese community. On occasion, the rodents found their way into the local diet. The consequences of civilian illness or death caused by American poison would be tragic. Sagely, Captain Kress recommended traps, which were subsequently requisitioned from Okinawa, delivered, and put to use. The value of a legal officer was thus demonstrated on another Marine Corps field of conflict.

In early May the MEB was redesignated III Marine Amphibious Force (III MAF), reflecting the Marines' increased strength and role in Vietnam. The change in designation had no effect on the legal section, which continued to service III MAF Headquarters, the 3d Marine Division, and until late May, the 1st Marine Aircraft Wing, as well.

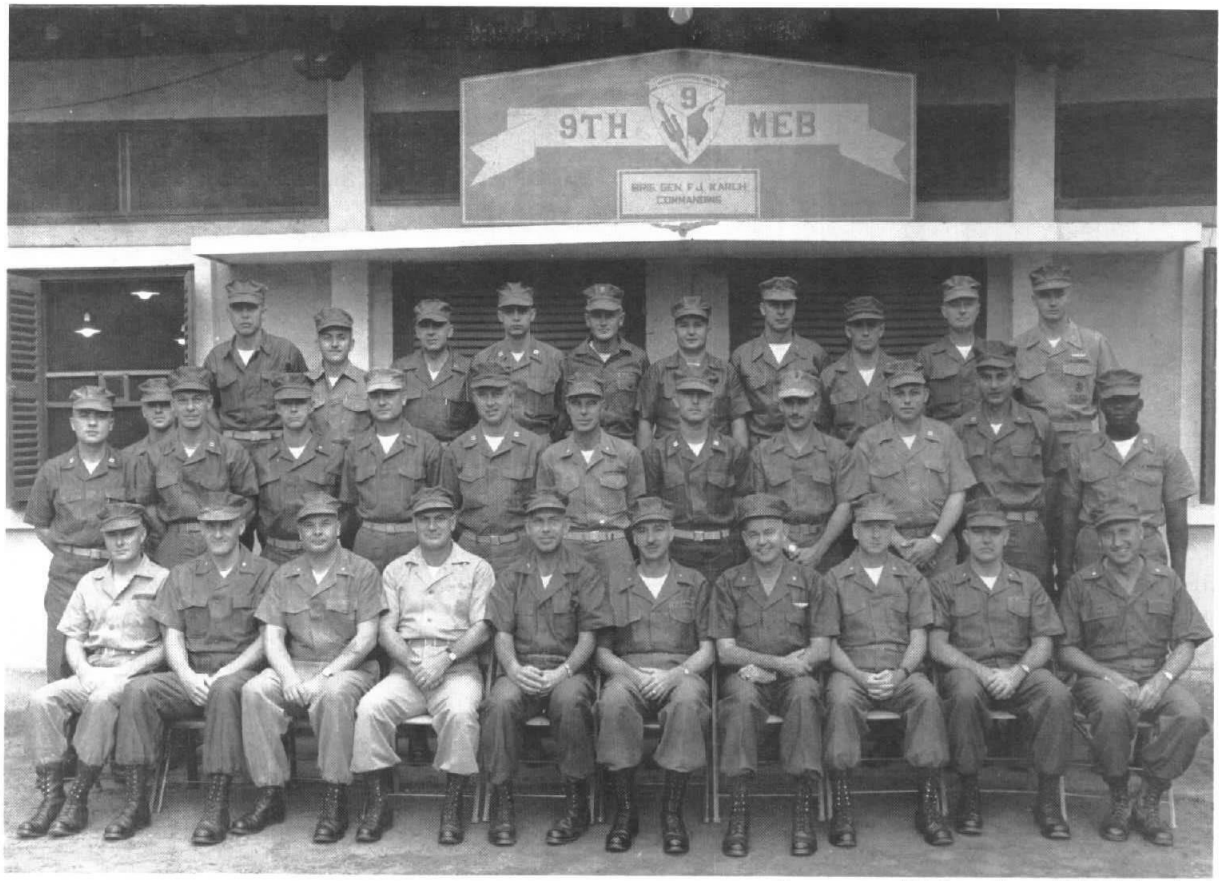
Until 9th MEB's arrival in Vietnam, Shufly's few cases requiring trial by special or general court-martial had been disposed of by sending the accused and the essential witnesses back to Okinawa or to Atsugi, Japan, for trial. With so many Marines now in Vietnam, that course was less practical.

The first potential general court-martial case arose in March 1965, when a returning Marine patrol was mistakenly fired upon by other Marines, resulting in the death of two, and the wounding of two others. Captain Kress requested legal support from Colonel Olin W. Jones, the 3d Marine Division SLO on Okinawa, who dispatched First Lieutenants Frederick C. Woodruff and Donald W. Harris from Okinawa to act as defense counsels in the investigation of the incident. They joined Captain Kress and the two enlisted clerks who made up the MEB legal office. They were soon joined by Navy law specialist Lieutenant (junior grade) Keith G. O'Brian.

Eventually an Article 32 investigation, akin to a civilian court's preliminary hearing, was held in the airbase chapel, to the distress of the Navy chaplain. (In time, Vietnam courts-martial were routinely tried in messhalls, officers' clubs, staff offices, chapels—any place with sufficient seating space.) An unnoticed electrical outage stopped the recording of the proceeding before its conclusion and made the required verbatim transcript impossible. The partial record, though, was sufficient to allow the 9th MEB commanding general and convening authority, Brigadier General Frederick J. Karch, to determine that a court-martial was not warranted. The difficulty with electrical power, however, was a portent of generator failures, power drops, surges, and outages that would plague courts-martial as long as the Marines remained in Vietnam.

In April 1965 civil affairs and legal matters increased as the number of Marines in Vietnam increased. Two of the 3d Marine Division lawyers who had augmented Captain Kress' office for the shooting investigation, Lieutenant Harris and Navy Lieutenant O'Brian, remained in Da Nang, Lieutenant Harris as III MAF's first civil affairs officer.[1] Lieutenant Harris' initial assignment was to write a handbook on civil affairs, a subject about which he knew little. Undaunted, he visited a U.S. Army Special Forces unit in Da Nang and borrowed its Army civil affairs field manual. He copied most of it in longhand, making appropriate changes to conform to Marine Corps terminology, and forwarded "his" handbook to the commanding general. It was returned with the notation, "outstanding job, lieutenant." Lieutenant Harris' nonlegal assignment was secure.[2] His later Navy Achievement Medal recognized his more substantive achievement in the Vietnamese pacification program.[3]

Sometime later the commanding general directed Captain Kress to confer with Colonel George S. Prugh, the U.S. Army's Staff Judge Advocate at the U.S. Military Advisory Command, Vietnam (MACV), in Saigon. Colonel Prugh, a future Judge Advocate General of the Army, and Captain Kress coordinated commu-



Department of Defense Photo (USMC) A-184276

Commanding General BGen Frederick J. Karch, sits fifth from right, and Capt Peter N. Kress, acting staff legal officer, and 1stLt Donald W. Harris, civil affairs officer, stand, center row, seventh and fourth from right, in this photo of 9th MEB staff in May 1965.

nication procedures between their respective legal offices, methods of handling foreign claims (over which the Army had cognizance), and other routine administrative matters.[4] That was the second of many meetings between Army judge advocates in Saigon and Marine Corps lawyers in III MAF. The first had been on 18 March 1965, when Colonel Prugh, along with his Vietnamese counterpart, Colonel Nguyen Mong Bich, and the MACV Chief of Claims, had flown to Da Nang to meet Captain Kress, discuss claims matters, and tour Marine Corps positions. Colonel Prugh said, "I think we enjoyed excellent relationships between MACV and Marine lawyers."

Through mid-1965 the 3d Marine Division (Rear), on Okinawa, continued to provide legal support for the 9th MEB/III MAF. Before the level of the division's eventual involvement in Vietnam became apparent, Colonel Jones, the Division SLO, planned to rotate the MAF's legal officer every few months. Accordingly, in May 1965, Major James P. King deployed from Okinawa to Da Nang to replace Captain Kress, who returned to Okinawa. On 1 July Lieutenant Colonel Thomas B. Sparkman, in turn, replaced Major King. On 1 August Lieutenant Colonel Sparkman was succeeded by Lieutenant Colonel Charles B. Sevier, who assumed the billet of Staff Legal Officer, the first in Vietnam to hold the title as well as the billet.[6] Lieutenant Colonel Tom Sparkman remained as Lieutenant Colonel Sevier's deputy.

The SLOs' increase in grade, from captain to lieutenant colonel in a period of five months, reflected the accelerating pace of Marine Corps deployments to Vietnam. In April two battalion landing teams and a regimental landing team headquarters arrived, followed by three squadrons of the 1st Marine Aircraft Wing. Those additions brought Marine Corps strength in Vietnam to 8,878. The future requirements for increased legal support, however, were not yet recognized, either on Okinawa or at Headquarters Marine Corps in Washington.

In May 1965 airbase construction began at Chu Lai, a barren stretch of coastline 57 miles southeast of Da Nang, where previously there had been no permanent American military presence. Three more battalion landing teams arrived there, and the 1st Marine Aircraft Wing established a forward headquarters at Chu Lai, as well.

By mid-June another 9,000 Marines were ashore in the three enclaves, now established at Da Nang, Chu Lai, and Phu Bai. In July Okinawa's 3d Marine Division (Rear) joined 3d Marine Division (Forward), uniting the division in Vietnam. In August the new commanding general of both III MAF and the 3d Marine Division, Major General Lewis W. Walt, split the division staff by establishing another headquarters, Task Force X-Ray, at Chu Lai.[7] As the build-up proceeded, the lawyers' caseloads increased as well. The III MAF SLO's small section was still servicing both the MAF headquarters and the 3d Marine Division, both of which had grown in size dramatically, as well as units of the 1st Marine Aircraft Wing.

The SLO, Lieutenant Colonel Charlie Sevier, had already been selected for promotion to colonel when he arrived in Vietnam. He had been an enlisted Marine in World War II, eventually becoming a lieutenant and a tank platoon commander. He had seen combat on Saipan, Tinian, and Okinawa and after the war earned his law degree and returned to active duty and the Korean War. In 1956 he was the prosecutor in the widely reported McKeon case, in which a Parris Island drill instructor was convicted of negligent homicide in the drowning deaths of six recruits at Ribbon Creek.[8]

Now in his third war, Lieutenant Colonel Sevier noted that, at first, the division moved support personnel, including lawyers, from Okinawa to Vietnam only with reluctance. An example was demonstrated by Major King, a 3d Division lawyer trained in civil affairs. Major King, having been relieved as the III MAF legal officer by Lieutenant Colonel Sparkman, wished to remain in Vietnam. Although there were no vacant legal billets, Major King prevailed upon the SLO on Okinawa to offer him to III MAF as the civil affairs officer, replacing Lieutenant Harris. Not long after Major King's arrival in Da Nang the commanding general spotted him and, recognizing him as a lawyer, growled, "What the hell are you doing here?"[9] Nevertheless, for the first time since the Korean War, Marine Corps lawyers were in the field with combat elements. As support personnel, they had no direct role in combat operations, but answered the commander's need for specialized advice and support.

Photo courtesy of BGen James P. King, USMC (Ret.)

Maj James P. King, III MAF Civil Affairs Officer, center, looks on as an officer is questioned by LtGen Victor H. Krulak, the Commanding General, Fleet Marine Force, Pacific, at Chu Lai in May 1965.

For a year after the initial landings the Staff Legal Office for III MAF headquarters and the 3d Marine Division remained a single office. Major General Walt commanded both units. Lieutenant Colonel Sevier recalled, "Walt had two hats. We talked to him in whichever office we happened to catch him, about either [unit]."[10] Although this duality of command often led to confused staff work, it was not a problem for the SLO, because the few court-martial cases presented no difficulty.[11] A general court-martial was not held in Vietnam for four months after the landings.[12] Initially, the Marines were too busy to fall prey to disciplinary problems. Lieutenant Colonel Sevier said, "when we first got down there, they were not let stray too much . . . . It's a combat situation that's new to them, so initially you don't get a lot of trouble. It's only when they've been in country a while and they've got their confidence built up."

Lieutenant Colonel Sevier's new deputy, Major Fred Grabowski, proved adept at the location and procurement of materiel useful to the legal office, often without disturbing usual supply channels. Shortly after

his arrival, in July 1965, Major Grabowski acquired four highly valued general purpose tents. One of these he gave to new-found acquaintances in a nearby wing engineer unit. They, in return, constructed wooden framing and flooring for the remaining three tents, which were erected near the rear of MAF/Division Headquarters. The tents allowed the small legal staff to move from a partitioned corner of the messhall where they had previously been located. One of the tents was employed as the work space for the SLO, his deputy, and the enlisted legal chief, Master Sergeant Harold L. Tetrick; another was for the defense counsels, legal assistance, and claims lawyers; the third was for trial counsels. Later, a fourth tent was added and used as a "courtroom," to the relief of the chaplain, as well as the mess chief, whose messhall had also been pressed into service as a hearing room.[14]

The tents' sides could be rolled up in hot weather, but that provided little relief. The dank, heavy odor of a hot tent was not soon forgotten. The tentage found in Vietnam was old. Rain created problems of leakage, damage to documents, and drainage. Still, the lawyers knew they were better off than the many Marines who lacked even a tent.

Through 1965 the number of cases assigned to each counsel—the caseload—remained low. Recollections of the actual number of cases assigned varied from two or three cases to nine or ten.[15] In any event, the number was fluid and not very high. In September the surrounding city of Da Nang was put off limits to all Marines, except for purposes of official duty or business, two broad exceptions.[16] The commission of minor offenses and crimes was reduced by the off-limits order. Unlike later arriving units, the first Marines that landed in Da Nang were integral, cohesive units. That, too, contributed to the initially low offense rate. Second Lieutenant John E. Gillmor, Jr., recalled: "During that period we sent half the legal department to China Beach to go swimming . . . . Boredom was our biggest real enemy."[17]

Of the three levels of court-martial under the 1951 *Manual for Courts-Martial*, which was still in effect,

Maj Fred Grabowski, Deputy Staff Legal Officer, III MAF/3d Marine Division, works in a section of the messhall before legal personnel were assigned their own work space.

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

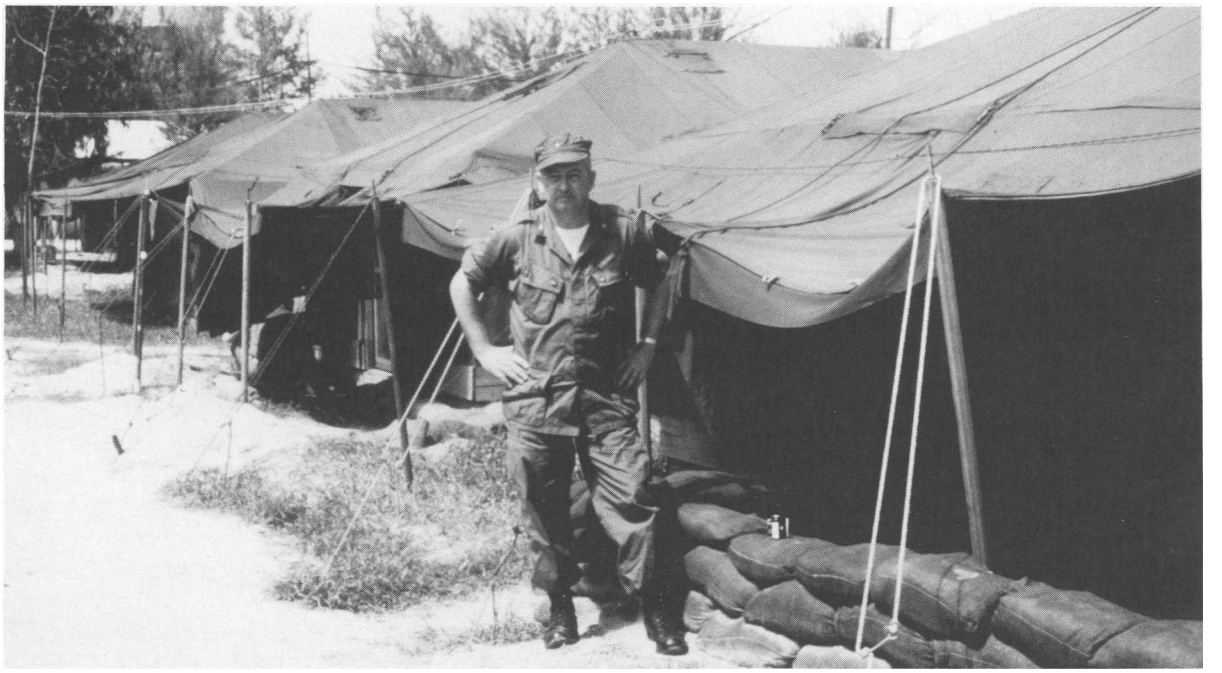


Photo courtesy of Col Charles B. Sevier, USMC (Ret.)

In September 1965, LtCol Charles B. Sevier, III MAF/3d Marine Division Staff Legal Officer, stands before his recently erected "office" in the rear of the III MAF compound.

the most serious offenses were tried at a general court-martial, which required lawyer counsel. The intermediate-level special court-martial was employed for the majority of cases. Lawyers were not a requirement in special courts, although they were sometimes assigned. Summary courts-martial were one-officer hearings which disposed of minor offenses, as the term suggests, in a summary, greatly simplified proceeding. The maximum permissible punishment a summary court-martial could impose was much less than that of a special or general court-martial. The officer hearing the summary court-martial case did not have to be a lawyer, and rarely was. The accused could refuse trial by a summary court, in which case the officer with authority to convene the court-martial could, and usually did, upgrade the case to a special court-martial, which could not be refused.[18]

In many cases the non-lawyer officer assigned to conduct a summary court-martial would advise the accused, before trial, to confer with a lawyer. That could result in the lawyer advising the Marine to refuse a summary and request a special court, if a lawyer would then be assigned to represent him. Sometimes such an agreement could be struck with a convening authority. In that way the accused would have attorney representation, although he also risked greater punishment if found guilty at a special court-martial. However, most often, Marine Corps lawyers participated in special courts-martial only when the offense appeared to warrant a bad conduct discharge.[19]

Lieutenant Colonel Daniel F. McConnell, later a deputy SLO in Vietnam, noted that he regularly made the more capable junior lawyers available to act as summary courts-martial, as well. "The convening authority was generally pleased," McConnell recalled. "The accused felt more secure, and justice was served."[20] But within a few years, Marine Corps lawyers would be too occupied with more serious cases to allow such a luxury.

General and special courts-martial were decided by members. The 1951 *Manual for Courts-Martial* did not provide for a case to be heard solely by a judge. Indeed, there were no judges, as such. A law officer, similar to a judge, presided at general courts-martial. Occasionally, a law officer was made available to act as the senior member of a special court, which had no provision for a law officer and was otherwise directed by a nonlawyer officer.[21]

Most of those cases that reached Marine Corps lawyers in Da Nang were serious. For example, a high number of negligent homicide cases were tried.[22] Many of those were referred to as "quick draw" cases in which

Marines mishandled their weapons, often .45 caliber pistols, with tragic consequences.

A typical caseload was that of First Lieutenant Robert A. "Tony" Godwin. After spending five and a half months on Okinawa, he arrived in Da Nang in August 1965. In the seven and a half months he remained, he was defense counsel in ten general and five special courts-martial. The general courts-martial included two homicides, a vehicular homicide, two rapes, and two robberies. Among the special courts-martial was a "quick draw" assault with a deadly weapon, two assaults of officers, and sleeping on post. Seven of the 15 courts-martial were pleas of guilty, several with pretrial agreements which limited punishment to agreed upon limits. Of the eight cases that went to trial as not-guilty pleas, Lieutenant Godwin gained acquittals in three, conviction of a lesser offense in one, and mixed findings (guilty of some offenses, not guilty of others) in three. Only one resulted in a straight guilty finding.[23]

1stLt Robert A. Godwin, starched and pressed, poses at Camp Courtney, Okinawa, shortly before his departure for Da Nang and duty as a defense counsel.

Photo courtesy of Col Robert A. Godwin, USMCR

Homicide, rape, robbery—serious offenses were being tried in Vietnam, even at that early point. At the same time, 15 cases in seven and a half months is a very light caseload, even with the other duties all counsels carried out.

Those other duties included legal assistance counselling (always of significant volume overseas); boards of investigation which occasionally involved lawyer participation; administrative discharge boards; occasional informal, one-officer ("JAG Manual") investigations; and the usual legal advice to the command.*

From a Lawyer's Case File: One Homicide, Two Victims

Private First Class Kenneth Wheeler was 18 years old when he killed his best friend.[24] Before coming to Vietnam he and the victim, Private First Class Richard E. "Rick" Cronk, had been close, going on liberty together and living in the same squadbay. Wheeler had dated Cronk's sister. On 23 August 1965, with Company E, 2d Battalion, 9th Marines, they had been in combat, and later, were relaxing with their unit. As his friend, Cronk, floated on an air mattress in a shallow stream, Wheeler, thinking it unloaded, pointed his M-14 rifle at Cronk in jest. Cronk died almost instantly from a bullet that pierced his throat. Wheeler arrived at the battalion aid station in shock, unaware of his surroundings or those who carried him there. He could neither walk nor speak.

Forty-seven days later, before a general court-martial, he pleaded guilty to culpably negligent homicide. He offered neither defense nor excuse and made no plea for mercy. His defense counsel, First Lieutenant Tony Godwin, offered a letter in mitigation from the mother of the victim. She wrote:

> I was stunned and heartsick to hear that my son's friend K. Wheeler is being tried for his death . . . but we did know in our hearts it was a tragic accident . . . . All of these men were tired, dirty and probably tensed up from four days out on duty.
>
> Rick leaves a family who loved him dearly and he was so much a part of all our lives, but to know that Wheeler . . . must pay for his death won't make it any less hard to bear. In fact, we feel it will serve no purpose for this boy

*Boards of investigation, relating to non-judicial punishment, were provided for in the 1951 *Manual for Courts-Martial*. They expired with the implementation of the 1969 *Manual for Courts-Martial*.

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

Drinks were inexpensive but ambience was in short supply, at the Chu Lai officers' club.

to be punished any more than he is already. He is in his own private hell which is enough!

I hope, on our behalf, you can enter a plea for complete acquittal . . . . He needs his friends now.

The court-martial took only two hours and thirty-five minutes from opening to sentencing: confinement at hard labor for 12 months, forfeiture of all pay and allowances for a year, and reduction to private. Neither a dishonorable discharge nor a bad conduct discharge was a part of the sentence.

In his review of the trial the SLO, Colonel Sevier, wrote: "Under the circumstances of this case, confinement would be of no benefit to the United States or to the accused." The court-martial convening authority, General Walt, agreed and reduced the sentence to forfeitures of $60 a month for six months and reduction to private.

Within two weeks of the court-martial PFC Wheeler required psychiatric care, and on 18 November, suffering from severe depression, he was admitted to the psychiatric ward of the U.S. Naval Hospital in Yokosuka, Japan. After six months' hospitalization he was administratively discharged from the Marine Corps.[25]

Trying Cases

The lawyers of the combined 3d Marine Division/III MAF legal office prepared to split into two separate offices in early 1966. Meanwhile, that part of the airbase's former French Foreign Legionnaires' barracks that now housed Marine Corps officers was known as the bachelor officer quarters, or BOQ. Each room was assigned a Vietnamese housemaid, usually referred to as a "house mouse," who washed the occupants' clothes, kept the room reasonably clean, and shined boots to a high luster. The cost for these services was 500 piasters, or about $4.50, per month. The cost of rations was automatically deducted from each officer's pay. An officer's club which served 15-cent beer and 20-cent mixed drinks and employed Vietnamese waitresses, was available.[26]

The tent working spaces of the lawyers were not on a par with those of the staff in the permanent French buildings, but they were satisfactory. The four legal tents allowed for more space than the indoor staff enjoyed and a greater degree of privacy, which was necessary for interviewing witnesses and those accused.

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

Vietnamese interpreters were not assigned to legal sections. LtCol John L. Zorack, Task Force X-Ray's Staff Legal Officer in 1967, sits with an interpreter he hired, 13-year-old Binh Nguyen. With LtCol Zorack's assistance, Binh later emigrated to the United States.

Mud, rain, and dust were endured by everyone. The monsoon rains penetrated tents and rain gear. At times blowing almost parallel to the ground, the rain left puddles on cots, desks, and plywood floors. Mildew quickly formed on virtually any stationary object. In summer's heat the dust was ankle-deep in places, billowing in the air with each footfall. Passing vehicles left dust clouds hanging in their wake which deposited gritty coatings on exposed skin, papers, and court-recording equipment.

In Da Nang that important legal tool, the law library, was at best limited. The "standard issue" law library was not yet implemented. In 1965 and 1966 advance sheets did not reach Vietnam.* The Da Nang "law library" contained only bound volumes of past military appellate opinions, the *Martindale-Hubbell Law Directory* (a digest of state laws and a guide to attorneys in the U.S.), and the 1951 *Manual for Courts-Martial*. Volumes of the *United States Supreme Court Reports*, other Federal reports, form books, model jury instructions, legal treatises, and similar references were not among the combat materiel shipped to Vietnam.[27] In lieu of a law library the counsels relied on their notes from Naval Justice School and cited authority with which they hoped the law officer was familiar. Lieutenant (jg) John F. Erickson, a Navy law specialist, was once reduced to citing as authority a case he had read about in a recent edition of the *Stars and Stripes* newspaper, a lawyer's field expedient.[28]

Numerous Marines school-trained in the Vietnamese language were assigned to Vietnam as translators, usually to interrogator-translator teams and intelligence units. None served with the legal offices that often dealt with Vietnamese witnesses, victims, and claimants. For courtroom use the Marines hired translators from the local Vietnamese population, some of whom spoke excellent French and English.

*Advance sheets are copies of appellate court opinions, mailed to legal commands and offices as they are announced. Periodically the accumulated advance sheets appear as bound volumes. They are important to lawyers because they are the latest word on the appellate court's interpretation and application of the law.

At Chu Lai's Task Force X-Ray Lieutenant Colonel John L. Zorack's first interpreter was a 13-year-old boy. Of course, the Vietnamese were not trained as courtroom translators and their skills varied widely. In general, the standard was not high. "The problems in trying a case with an interpreter," Lieutenant Hugh Campbell recalled, "were just impossible . . . . [They] made it almost impossible to cross-examine witnesses."[29] Second Lieutenant John E. Gillmor, a 3d Marine Division defense counsel, added:

> Da Nang was on a border area for local dialects, and it was difficult to get a translator who could communicate with the [witnesses]. In addition, there was a cultural gap which made me suspect that the witnesses were trying to tell us what they thought we wanted to hear . . . . I was very much afraid that if we had a contested trial, my case would collapse over the translation issue.[30]

Although their function was explained and although the interpreter acknowledged understanding, counsel often realized in the midst of examination that the witness and the interpreter were having their own parallel conversation. The responses to questions often were suspected to be an amalgam of the witness' and translator's view of what constituted an appropriate answer. Sometimes a lengthy, obviously complex response by the witness would be translated by the interpreter as, "yes." But no case was reversed at the appellate level for inadequacy of translation, perhaps in recognition of the fact that all parties labored under the same burden.

As challenging as accurate translations were, locating and interviewing of witnesses, both military and Vietnamese, was equally difficult. The problems in locating a Marine witness, for example, were several. If he was an infantryman, he was probably in the field. But where was his company—if his company could be determined? Was the Marine unavailable because he was on patrol? Assigned to an outpost? Sent out of country on R & R? Had he been killed or wounded since the offense was reported? Had he already rotated back to the U.S. because his 13-month tour of duty in Vietnam was completed? Had he been sent home on emergency leave? Was he in an unauthorized absence status?

Although the same problems arose in non-combat areas, they were heightened in Vietnam by tactical considerations and inadequate communications and transportation. For lawyers accustomed to instant telephonic access, Vietnam was a new experience. Telephoning anyplace outside the vicinity reached by the unit's switchboard was a significant chore. Static, poor and broken connections, and interruption for higher priority calls were the rule. Captain William B. Draper, Jr., recalled his attempts to go from one codenamed switchboard to another via a military telephone, called a "double-E-eight," for its military designation, EE-8. As he recalled:

> It is doubtful if everyone doesn't have several hair raising tales of . . . frustration. Who can forget hollering "Isherwood, give me Grasshopper!" into a seemingly dead double-E-eight for hours on end, only to finally get the connection and have it pre-empted immediately. Occasionally communication foul-ups resulted in something more than jangled nerves: . . . walls with your fist imprint in them.[31]

As difficult as it was to locate a Marine, finding a Vietnamese was even more challenging. Phone books and subpoenas were not an option. To an American, Vietnamese names were similar and confusing. There simply was no practical way to summon a Vietnamese to a court-martial. All one could do, if the statement of a Vietnamese witness or victim was required, was to go to them.

Twenty-seven Navy lawyers served in Marine Corps legal offices in Vietnam during the war. The first was Lt (later RAdm) Hugh D. Campbell, shown at Da Nang in 1965. He was III MAF/3d Marine Division chief defense counsel. In November 1986 he assumed the duties of the Judge Advocate General of the Navy and Commander, Naval Legal Service Command.
Photo courtesy of RAdm Hugh D. Campbell, JAGC, USN (Ret.)

Colonel Sevier recalled when he first became aware that his lawyers were taking the initiative in the witness location process:

> I walked out of the legal tent and I saw this [military] truck, and it had about four of my lawyers and two of my NCOs on it, and they were all holding goddamn rifles! . . . . I turned to this Navy lieutenant [Campbell]: "What in the hell are you people doing?" "We're going out there in bandit country, and pick up the Vietnamese witnesses." Well, I looked, and then I said [to myself], I'm going to let them go and they'll hang me. But I said, "Okay." A Navy lieutenant! A helluva nice kid.[32]

Lieutenant Campbell, who became the Judge Advocate General of the Navy 21 years later, was on one of the earliest forays to find witnesses in contested territory. In the next six years countless similar missions to locate essential trial participants were carried out. It was a novel but necessary trial preparation method in Vietnam. As Colonel Sevier noted:

> It worked because of the people we had . . . . Lieutenants who'd gone through OCS and the Basic School. They had some background in the infantry and could get around. They were capable of leaving the C.P. and going to a regiment, or a battalion and doing their investigation, running a pretrial [investigation], going out in the bush with a patrol. They'd interview witnesses through an interpreter. They had that capability.[33]

When not locating witnesses or preparing for court, the lawyers often looked for other constructive activity to occupy free time. Civic action, for example, was not only the concern of the staff officers assigned to that section. The 3d Marine Division's command chronology for the period noted: "At this stage . . . Division Civic Action units are stressing maximum contact with the local Vietnamese population."[34] Although attorneys had no formal connection with civic action, First Lieutenant Tony Godwin and other lawyers from the 3d Division/III MAF staff taught English in a local Vietnamese high school, using Vietnamese-English textbooks. The Marine Corps teachers concealed their sidearms under their utility uniform shirts.[35] Throughout the war Marine Corps lawyers took an active role in the civic action program.

III MAF: Headquarters Without Lawyers

After an enemy attack on the Da Nang Airbase in July 1965 General Walt, concerned with security, ordered the 3d Marine Division command post moved from the airbase to a location three miles to the west on the northern slope of Hill 327.

From 11 to 15 November in heavy monsoon rains the 3d Division Headquarters, including the Staff Legal Office, relocated to Hill 327.[36] The 1st Marine Aircraft Wing, including its legal personnel, and III MAF headquarters, remained at the airbase.

Colonel Vernon A. "Vap" Peltzer was the first Staff Legal Officer assigned to III MAF Headquarters. (Although Colonel Sevier had been overseeing III MAF Headquarters' legal affairs, he was actually assigned to the 3d Marine Division.) As a matter of fact, Colonel Peltzer was the headquarters's only legal officer at the time. Several other attorneys were on the MAF staff, but they were acting in other capacities.

In retrospect, the assignment of a colonel as SLO of III MAF was notable. Those making assignments at Headquarters Marine Corps could not have anticipated that, when the headquarters of III MAF and the 3d Marine Division became geographically separated, III MAF would not be designated a court-martial convening authority. The commanding general of the 3d Division had always had such authority. The command having only recently been formed in Vietnam, III MAF's commanding general did not have such authority. Without this authority (a simple administrative act by the Secretary of the Navy confers it) the MAF commanding general could not order a court-martial convened. Lacking that power, and having relatively few Marines assigned to it, the MAF had little need for lawyers, so the lawyers all moved to Hill 327 with the command that conducted trials, the 3d Division. It was not surprising that the SLO for the 1st Marine Aircraft Wing wrote the legal officer for Fleet Marine Force, Pacific that "although I do not know if III MAF has requested a lawyer, I earnestly do not feel that they need one. Any legal work that they have can be accomplished by the lawyers presently on hand as an additional duty."[37] The 3d Marine Division SLO, Colonel Sevier, was more laconic when he said about the III MAF legal office, "there wasn't much to do, down there."[38]

If Colonel Peltzer found himself without a great deal of work, the fault was not his. He shared an office with the III MAF surgeon, had no law library, did no legal assistance, and had no subordinates. What were the responsibilities of the III MAF SLO? "Just to keep General Walt informed as to what was going on," Colonel Peltzer recalled with frustration.[39] He also reviewed cases tried at other commands, convened a number of investigations, and acted as counsel for the growing Da Nang port facility.

The other attorneys on the MAF staff were assigned nonlegal duties. Colonel Olin W. Jones, SLO of the 3d Marine Division, had served with General Walt in

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Marine Corps lawyers served in numerous roles in Vietnam. In 1966 Maj Charles J. Keever became the III MAF Assistant Chief of Staff, G-5 and Special Assistant to the Commanding General (Civic Action).

Korea. Shortly after assuming command in June 1965, General Walt sent to Okinawa for Colonel Jones, who then acted as General Walt's Deputy Chief of Staff for Administration, Logistics and Area Coordination Matters. That novel billet continued for two months and made Colonel Jones available for legal consultation along with the MAF's assigned SLO.[40]

Major Charles J. "Chuck" Keever, recently of the Staff Legal Office on Okinawa, was the Assistant Chief of Staff, G-5 and Special Assistant to the Commanding General (Civic Action). General Walt believed that civic action was more than benevolence. He thought that it could be used as a weapon to sever the populace from Viet Cong control. Major Keever, without prior training in civic action, was directed to draft a policy that would give overall direction to the civic action program and focus the good-will efforts of individual Marines. He wrote the first MAF order for civic action and, upon its acceptance, saw to its implementation. He later received the Legion of Merit for his work.[41]

Captain William T. Warren was assigned to the III MAF G-4 office. Like Major Keever, he had been a lawyer serving on Okinawa and had asked to be sent to Vietnam, even if in a non-legal capacity. In June he found himself the III MAF Real Estate Officer, another billet not found in the table of organization but closely related to the tactical security of the Da Nang Airbase. After the July 1965 Viet Cong raid on the airbase destroyed a number of Air Force planes, Captain Warren was tasked with clearing a 300-yard wide security zone around the entire perimeter of the airbase. That effort eventually involved the relocation of 826 Vietnamese houses, approximately 5,000 Vietnamese, and (a delicate matter) 6,000 graves. Working with Le Chi Cuong, the mayor of Da Nang, the relocation effort took three and a half months to dismantle and move houses, shrines, shops, and temples to new locations. Work crews, with the approval of the owners, simply demolished some structures, and III MAF compensated the Vietnamese. Each family received a 30,000 piaster (about $270) relocation allowance in addition to compensation, if their house was demolished. Captain Warren was surprised to find that the Vietnamese, although concerned, did not appear to be at all hostile.[42] His work was one of the few instances in 1965 when a lawyer had opportunity to directly support the commander's tactical mission.

Another lawyer on the staff of III MAF was Major Benjamin B. Ferrell, the Assistant G-1/Civil Affairs Officer. The citation for his Bronze Star Medal summarized his duties and performance:

> [His] area of responsibility covered approximately 7,000 square miles . . . . During the day he traveled throughout the area meeting the Vietnamese leaders of towns and hamlets, discussing their problems and ascertaining their needs. At night Major Ferrell prepared the detailed orders and reports required to implement a meaningful civil affairs program and to procure needed . . . supplies and equipment.[43]

The III MAF lawyers remained at the Da Nang Airbase while the 3d Marine Division Headquarters moved to Hill 327 into newly erected strongback tents.

1st Marine Aircraft Wing: Touching Down

Until 31 August the elements of the 1st Marine Aircraft Wing (1st MAW) in Vietnam were designated 1st MAW (Advance). Parts of the MAW headquarters remained at Iwakuni, Japan, until early in 1966, while most of the wing deployed to Da Nang in increments throughout 1965.[44]

The MAW's first SLO, Major Paul A. A. St.Amour,