

PART IV
AFTERMATH AND ECHOES

Prisoners of War, and Others

*Prisoner Misconduct: Charges—From a Lawyer's Case File: Wartime Acts, Post-War Trial
Deserters in the Hands of the Enemy—White VC?: Robert R. Garwood*

In July 1967, at the direction of the Joint Chiefs of Staff, planning for the return of American prisoners of war (POWs) began. A Department of Defense Prisoner of War Policy Committee, which included Marine Corps representation, was established. In June 1968 the committee issued guidance to the secretaries of the military departments delineating policies for processing returned POWs.¹

In late 1971 the U.S. Air Force plan for the repatriation of its POWs, eventually named Operation Homecoming, became a joint service operation under Air Force leadership.² That same year Headquarters Marine Corps formed a three-officer POW screening board. The Judge Advocate Division's representative to the board was Lieutenant Colonel Michael Patrick Murray, succeeded in 1972 by Major David M. Brahms, formerly the deputy SJA of the 1st Marine Aircraft Wing in Da Nang. Major Brahms, along with representatives from Headquarters' public affairs office and the personnel division, continually reviewed the status and circumstances of Marine POWs.³

At the signing of the Agreement on Ending the War and Restoring Peace in Vietnam, the North Vietnamese provided the names of 555 American servicemen held prisoner and 55 others who had died in captivity. Twenty-six Marines were among the captives; eight were reported to have died.⁴ Forty-one POWs of various Services had already been released by the Vietnamese. Operation Homecoming went into effect upon the signing of the peace agreement. At Headquarters Marine Corps Colonel Richard G. Moore was the Judge Advocate Division's action officer for Homecoming.^{5*} Air Force lawyers addressed legal issues relating to the operation itself, although Lieutenant Colonel Joseph A. Mallery, Jr., and Major Neal T. Roundtree were legal advisors to the Marine Corps

Processing Team. In January 1973 Lieutenant Colonel Mallery and Major Roundtree arrived at Clark Air Force Base, in the Philippines, where the ex-POWs initially landed after their release. Once the first increment of ex-POWs arrived on 12 February, it was clear that one Marine Corps lawyer was sufficient to meet their legal assistance needs and Lieutenant Colonel Mallery returned to Okinawa.⁶

At Headquarters Marine Corps, the POW screening board, to which Major Brahms was assigned, had been aware that there probably would be allegations of misconduct made against a few prisoners. The board wrestled with its recommendation as to how such allegations should be handled. "After the POWs were coming out, a couple of policy decisions were made [by the Department of Defense], restricting how we would do business," Major Brahms recalled. "One, there would be no 'propaganda statement' prosecutions [and] no charges would be brought against any POW except by another POW."⁷ So the decision to charge would not be that of the Department of Defense or the Secretary of the Navy, but of the prisoners themselves.

The policy to not charge former prisoners for propaganda statements was intended to ensure that no prisoner would be tried for "confessions" or broadcasts made as a result or coercion or torture. The exemption, necessarily broad, was eventually employed in defense of statements made under far less onerous circumstances.

Prisoner Misconduct: Charges

Eight enlisted men, three Marines and five soldiers, and one Navy and one Marine officer were charged with misconduct while in the hands of the enemy. Staff Sergeant Alfonso R. Riate, Sergeant Larry Able Kavanaugh, and Private Frederick L. Elbert, Jr., and five Army enlisted men, were charged with mutiny, making propaganda statements, cooperating with the enemy, disobedience of orders, and attempting to persuade other POWs to disobey orders. The charges against all eight were sworn to by Air Force Lieutenant Colonel Theodore Guy, himself a prisoner for five years.

*After serving in Vietnam as a major and deputy SJA of Force Logistic Command in 1968-69, Colonel Moore was SJA of the 3d Marine Aircraft Wing at El Toro, then Deputy Director of the Judge Advocate Division. He then graduated from the State Department's year-long Senior Seminar in Foreign Policy, followed by duty as SJA, 3d Marine Division, and a second assignment as SJA, 3d Marine Aircraft Wing. After serving as Assistant Judge Advocate General of the Navy for Military Law, he retired and was advanced to the grade of brigadier general on 1 May 1981.



Marine Corps Historical Collection

Three enlisted Marines were charged with misconduct while prisoners of the North Vietnamese. Two of them, SSgt Alfonso R. Riate, left, and Pvt Frederick L. Elbert, Jr., are shown after returning to the United States.

The two officers, Marine Corps Lieutenant Colonel Edison W. Miller and Navy Captain Walter E. "Gene" Wilbur were charged with mutiny, failure to obey orders by accepting special favors from the enemy, making propaganda statements, informing on fellow prisoners, attempting to persuade others to disobey orders, wrongfully communicating the activities of fellow prisoners to the enemy, and attempting to promote mutiny, disloyalty, and insubordination among fellow POWs. Their accuser was Rear Admiral James B. Stockdale, who was awarded the Medal of Honor for his conduct during the seven and a half years he was a prisoner. Admiral Stockdale later said of his having to initiate the legal proceedings, "Let us hope that the U.S. government feels a little more sense of responsibility for seeing that justice is done after the next prisoner return, and files its own charges."⁸ Major General George S. Prugh, the Army's Judge Advocate General, agreed, saying:

It would have been useful for the Navy, Marine Corps, and the Air Force to have supplied senior prosecutor types to advise and assist the senior POWs in the drafting of charges, especially where the issue involved command in the PW compound by the senior officer present. That concept had not been tested in law Certainly Admiral Stockdale

. . . is justified in being disappointed that the PW command structure was not ultimately sustained.*

At a 1 June 1973 meeting with the Secretary of the Navy, representatives of the Army, Navy, and Marine Corps discussed their views of the charges to assure a generally similar approach.¹⁰ After that meeting "we sorted through the enlisted cases, first," Major Brahms recalled. "The Army decided, fairly early on, that they did not want the problem . . . and the Secretary of the Navy pretty much decided the same thing."¹¹

On 22 June 1973 the Acting Judge Advocate General of the Navy, Rear Admiral Horace B. Robertson, Jr., forwarded a lengthy memorandum to the Secretary, reviewing the charges against the three enlisted Marines, discussing the legal issues, and recommending possible courses of action. The admiral pointed out that many of the charges were subject to the Department of Defense policy against prosecuting propaganda statements made in captivity, and that other charges technically failed to state an offense. He noted that the cases would be long and drawn out and accompanied by great publicity, that the possibility of conviction was marginal, and that former POWs would be called as witnesses and "would certainly be subjected to the most rigorous and searching cross-examination as to their own conduct and motives."¹² Even in the event of conviction, he noted, the likelihood of a substantial sentence was small. In light of those facts, Admiral Robertson recommended the charges be dropped. On 3 July, the Secretary of the Navy determined that further proceedings against the enlisted Marines would be inappropriate. Six days before, Sergeant Able Kavanaugh had shot and killed himself. The two remaining enlisted accuseds were given honorable discharges.¹³

The cases of Marine Corps Lieutenant Colonel Miller and Navy Captain Wilbur were addressed next. Lieutenant Colonel Miller was shot down over North Vietnam and captured on 13 October 1967. He was held captive for the next five years and four months. Captain Wilbur was a prisoner for four years and eight months. Among the charges still pending against the

*In discussing the prisoner's command structure while in enemy hands, Vice Admiral Stockdale wrote, "You would be doing most of us ex-prisoners of Hanoi a favor (in discussing the creation of prisoner of war law) if you would just omit that term '4th Allied POW Wing' To most of us, references to this so-called '4th Allied Wing' make us [sick] I would just refer to it as the prisoner underground organization." (VAdm James B. Stockdale ltr to author, dtd 28Jan89. Comment folder, Marines and Military Law in Vietnam file, MCHC.)

two were soliciting fellow prisoners to mutiny, refusing to obey lawful orders, accepting special favors from the enemy, and informing against fellow prisoners.

Lieutenant Colonel Miller's assigned defense counsel was Captain John L. Euler, senior defense counsel at Camp Pendleton and formerly a defense counsel at Force Logistic Command in Vietnam.¹⁴ Miller later retained civilian counsel. Secretary of the Navy John Warner assumed personal control of the two officer cases. He sought the recommendation of the Commandant of the Marine Corps in Miller's case. As Major Brahms recalled:

The Marine Corps initially thought that prosecuting Miller was probably the right way to go. I was called in one Saturday morning by my boss [Brigadier General John R. DeBarr, Director of the Judge Advocate Division] and told, "The Commandant [General Robert E. Cushman, Jr.] wants a letter to the Secretary of the Navy on his position regarding prosecuting Miller." . . . I went through all the evidence again and wrote a couple of pages that concluded that prosecution was not called for . . . and [the Commandant] signed it, without change . . . It obviously was not my decision;

Sgt Larry A. Kavanaugh is greeted at Clark Air Force Base soon after his release. Kavanaugh committed suicide six days before it was announced that he would not be court-martialed.

Department of Defense Photo (USAF)

it was General Cushman's decision . . . and ultimately, of course, the Secretary's.¹⁵

In the Commandant's office on the second deck of the Navy Annex, Secretary Warner conferred with the Commandant, the Assistant Commandant, General Earl E. Anderson, and Brigadier General DeBarr. The decision was not a simple one, General Anderson later noted.¹⁶ As Brigadier General DeBarr remembered: "The evidence and the circumstances of the case were reviewed. It was the position of the Marine Corps to try the case, but it was evident . . . that the case could not be successfully prosecuted. It was then that General Cushman signed the letter prepared by Major Brahms."¹⁷ General Anderson recalled that "it was a very difficult decision for General Cushman to make, but he realized the constraints placed on him and reluctantly took his final position."¹⁸

Secretary Warner considered the advice of the Commandant and the Judge Advocate General of the Navy, and personally interviewed 19 former POWs before





Department of Defense Photo (USMC) A26909
The only Marine Corps officer charged with misconduct while a prisoner of the Vietnamese was LtCol Edison W. Miller, left. Here he is greeted by LtGen Louis H. Wilson, Commanding General, FMFPac, on 16 February 1973, as he first arrives in the United States.

deciding to dismiss the charges against Miller and Wilbur. He did issue both of them administrative letters of censure. Captain Wilbur accepted his letter and retired from the Navy. Lieutenant Colonel Miller's letter of censure read, in part:

I have reached the judgement that your conduct . . . failed to meet those high standards which are required of an officer You placed your personal comfort and welfare above that of your fellow prisoners of war. But of greater seriousness, your conduct, at times and for extended periods, was severely detrimental to both the welfare and morale of your fellow prisoners.¹⁹

Prior to his repatriation, Miller had been selected for promotion to the grade of colonel. Although the Headquarters Marine Corps POW screening board had been aware of Miller's conduct while a prisoner, they had not reported it to the promotion board, not wanting to interfere with the regular administrative promotion process before Miller had an opportunity to respond to the allegations against him.²⁰

Freed of court-martial charges, Miller was promoted to colonel and retired for physical disability. He immediately applied to the Board for Correction of Naval Records (BCNR) for removal of the letter of censure from his record. After two hearings and an amazing seven years' consideration, BCNR recommended on

administrative grounds that the censure be removed. In 1982, the Assistant Secretary of the Navy for Manpower and Reserve Affairs, John S. Harrington, under whose purview such matters fell, rejected BCNR's recommendation. Miller sued the Secretary of the Navy in United States District Court, seeking removal of the censure. In 1985 the district court agreed with BCNR and ordered the censure removed.²¹ That decision was appealed by the Navy, resulting in reversal of the district court's order by the District of Columbia Court of Appeals. The Court of Appeals did, however, order BCNR to decide whether or not Miller's conduct as a POW merited the letter of censure given 12 years before.²² In a later cover memo on a letter to Vice Admiral Stockdale, apprising him of the status of the case, David Brahms, by then a brigadier general and Director of the Judge Advocate Division, wrote, "Fourteen years and we are still wrestling with Miller. Unbelievable!"²³

Finally, on 17 May 1988 BCNR determined that there were indeed grounds for a letter of censure. It remains in Colonel Miller's permanent military record.²⁴

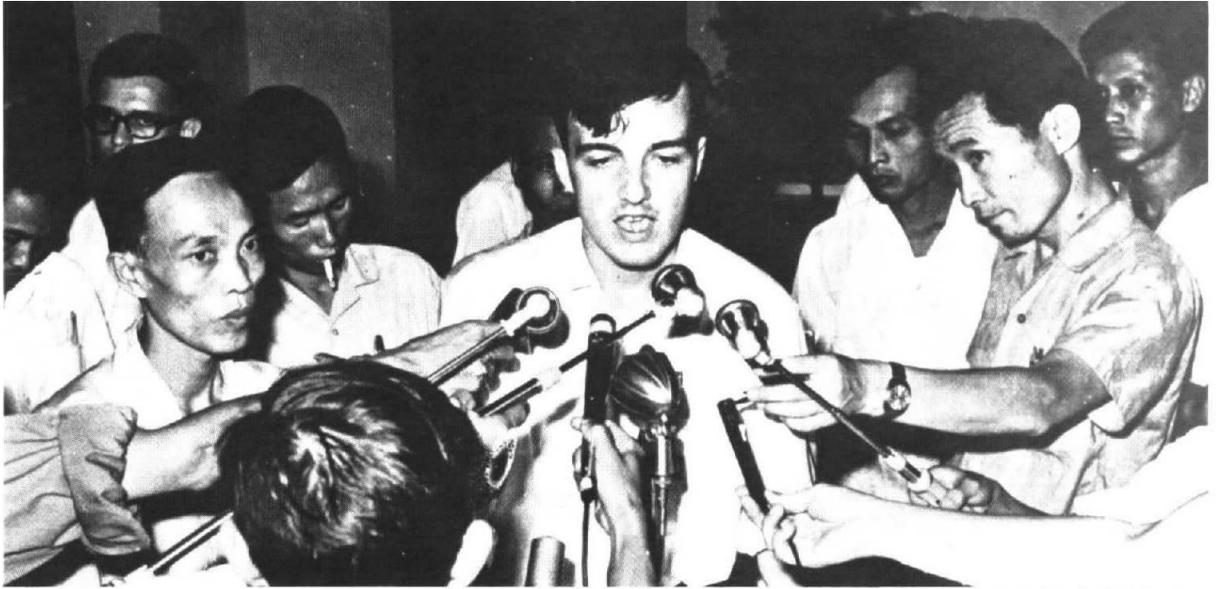
"The bottom line," General Brahms later said, "is that we decided to let everybody off." He continued:

I think I would [today] recommend we try those people It's probably necessary to get . . . the definitive judgement, and in this country the only way to do that is in court If I had to do it all over again, and had any input, I would feel strongly enough to take them to court-martial.²⁵

After deciding against trying the returned POWs, the last echo of the Asian war still had not been heard.

From a Lawyer's Case File: Wartime Acts, Post-War Trial

Marine Corps judge advocates addressed the aftermath of the Vietnam war for years after the peace accords were signed. Even before the war ended, Marine Corps lawyers who had not served in the combat zone were trying cases that had their genesis in Vietnam. One such case was the *United States v. Sergeant Jon M. Sweeney*. Sweeney joined Company M, 3d Battalion, 9th Marines in January 1969 as a private first class, and quickly earned a poor reputation. His battalion commander, Lieutenant Colonel Elliott R. Laine, Jr., remembered that "about all he'd do was feed himself."²⁶ Two weeks after his arrival, during Operation Dewey Canyon, Sweeney's company was heavily engaged. In the midst of the action Captain Thomas F. Hinkle, the company commander, was repeatedly advised by radio that Sweeney, or "Sierra," as he was referred to on the radio, could not keep up with his



Marine Corps Historical Collection

Sgt Jon M. Sweeney in Hanoi shortly after his release by the North Vietnamese. He was later tried for misconduct while a prisoner. His general court-martial ended in acquittal.

unit and had fallen behind.²⁷ Sweeney's company was the battalion's point company, which was fighting to wrest high ground from the enemy. Captain Hinkle later testified, "My point commander informed me that he was having difficulties with the character 'Sierra' . . . I told him to leave him in his position and I would be up there with the senior corpsman, and we'd take a look at him." Captain Hinkle found Sweeney lying on the ground. His squad had already shouldered all his gear except his rifle and ammunition. According to Captain Hinkle, "The senior corpsman looked at him . . . He said there was nothing wrong with him, physically. And I told him to move out and rejoin his people, and he said he couldn't make it." Disgusted, Captain Hinkle told Sweeney to wait for the rear guard which would be passing by within a few minutes, then left to rejoin the engaged lead element of his company. When the rear guard arrived they could not locate Sweeney. He had disappeared. When the firefight waned, a search was conducted. Only Sweeney's weapon and ammunition were found.

Nine months later a North Vietnamese broadcast, beamed to U.S. forces in Vietnam, was monitored by the Foreign Broadcasting Information Service.* A tran-

*Lieutenant Colonel Laine, Sweeney's battalion commander, recalls that Sweeney, using a false name but his correct service number, made broadcasts within two weeks of his disappearance while Operation Dewey Canyon was still in progress. Those broadcasts were not offered as evidence in Sweeney's subsequent court-martial.

script of the broadcast read, in part: "Stage a strike against the war . . . Refuse to obey any orders which would endanger your life . . . Stage mass demonstrations . . . I came to Vietnam in February '69 and I crossed over to the side of the Vietnamese people two weeks later." The speaker signed off, "Jon M. Sweeney, USMC, deserter." Fifteen other broadcasts followed in the next five months. Some urged racially oriented disobedience: "Black brothers, you must unite . . . Your fight is in the streets and cities of the United States . . . Refuse to serve as cannon fodder for the white oppressors." Others praised the enemy: "I am grateful to the Vietnamese people for letting me take part in their noble cause." Still others counselled desertion: "I'll inform you of the different ways to leave while on R & R, and then I will . . . tell you how to desert in Vietnam." As long as the circumstances of the broadcasts remained unknown, however, Sweeney was continued in a POW status and, in accordance with Marine Corps policy, promoted at the same rate as his nonprisoner contemporaries. That eventually proved difficult to explain to the military judge in Sweeney's prosecution for collaboration.

In a debriefing conducted soon after his release, Sweeney alleged that he had originally been captured when he wandered from where he was left by his company commander and, three days later, he was taken prisoner. Over the next month, according to Sweeney, he twice unsuccessfully attempted escape. After that,

he said he was held in Hanoi for a year and a half, although not with any other prisoners. On 25 August 1970, for reasons not explained by the North Vietnamese, Sweeney was released. Holding a North Vietnamese passport, he was escorted to Sweden with intermediate stops in Peking and Moscow. At a Stockholm press conference Sweeney admitted that he had stayed with the enemy to engage in propaganda activities against American troops. He added, "The reason why I do not want to return to the U.S. is not only because punishment is waiting for me there. I have changed sides."²⁸

An interview of Sweeney by Mr. Mike Wallace was shown on the CBS Evening News on 27 November 1970. Sweeney acknowledged making anti-American propaganda broadcasts for the enemy. The interview was later entered in evidence at Sweeney's court-martial, as was a Communist television news clip aired in Vietnam just after Sweeney's release, in which he made further incriminating statements.

Sweeney did return to the United States, and upon his arrival was placed under military apprehension (arrest). A Marine Corps intelligence debriefer noted that Sweeney's activities while a captive were not explored: "The nature of that of which he was suspected—collaboration with the enemy—and the fact he had an appointed military lawyer [Captain Carter LaPrade] to represent him during the conduct of the debriefing precluded thorough exploitation."²⁹

Sweeney, a sergeant by the time he was released, was charged with deserting his unit in combat, running from the enemy, and communicating with the enemy by broadcasting disloyal statements. (The Department of Defense policy against trying former POWs for statements made in captivity had not yet been formulated.) Sweeney's general court-martial convened at Quantico, Virginia, on 15 June 1971. He was represented by Captain James R. O'Connell and Mr. Gerald Alch of Massachusetts. The trial counsels were Captains William D. Palmer and Clyde R. Christofferson. The military judge, hearing the case without members, was Captain "B" Raymond Perkins, JAGC, USN.

Brigadier General Clyde R. Mann, then Director of the Judge Advocate Division, wrote of the 10-day trial:

We had trouble convincing the [military judge] that he had voluntarily aided the enemy, as the evidence indicated. After the Government had made a *prima facie* case . . . Sweeney raised an affirmative defense . . . admitting that he did do certain things . . . but claimed that he did them because someone held a gun to his head. In the absence of a rebuttal witness, and in view of our lack of response during his captivity and during the time . . . he

was operating on behalf of the enemy, the Court apparently was persuaded to accept his allegation that he did all of this under some type of duress.³⁰

Admiral Stockdale, who later derided "our courts, spring-loaded to excuse any action to which the general term coercion is attached," might have predicted the trial's outcome.³¹ On 11 August the military judge found the accused not guilty of all charges. Colonel Benjamin B. Ferrell, Quantico's Staff Judge Advocate, called the case "the greatest miscarriage of justice that I witnessed in the Marine Corps."³² Sweeney was honorably discharged as a sergeant.

Deserters in the Hands of the Enemy

On 8 November 1967 Private Earl C. Weatherman escaped from the III MAF brig in a truck that had been filled with sandbags. He had been convicted of several relatively minor offenses at a 22 September 1967 special court-martial and sentenced to five months confinement and a bad conduct discharge. After his escape, while en route to see a girl friend in a village near Chu Lai, he was captured by the enemy. He subsequently defected to the Viet Cong and assisted in their propaganda effort by making propaganda broadcasts and signing a propaganda leaflet. The Marine Corps listed him as a deserter in the hands of the enemy.³³ Despite his actions, some American prisoners who were held in the same camp as Weatherman believed that he never really accepted the propaganda he was himself spreading. That view may be correct, for he later was again considered by the VC to be a prisoner, and on 1 April 1968 he was shot and killed while attempting to escape.³⁴ The only other Marine in the Vietnam war to be listed as a deserter in the hands of the enemy was Private First Class Robert R. Garwood, who reportedly had convinced Weatherman to go over to the enemy.

White VC?: Robert R. Garwood

The longest court-martial in Marine Corps history, tried long after the war's end by judge advocates who had not been to Vietnam, was also grounded in events that occurred in the combat zone. On the evening of 28 September 1965, Private Robert R. Garwood, a driver assigned to the 3d Marine Division motor pool, left on what he said was an official run within the division headquarters area.³⁵ Instead, he drove to Da Nang, passed the Marine checkpoint near the beach, and continued toward the village of Cam Hai, where several VC attacked and captured him. The jeep was partially dismantled then burned. For the next year and eight months Garwood was a prisoner of war, held

in the regional detention camp, Camp Khu, northwest of Da Nang, along with two U.S. Army prisoners.

On 17 December 1965, three months after Garwood's disappearance, the 3d Marine Division recommended to Headquarters Marine Corps that his status be changed from missing to presumed captured. The recommendation was based on an anti-American broadcast and on propaganda leaflets, all written and signed by Garwood. Despite the broadcast and leaflets, his duplicity was not considered confirmed and as in Sweeney's case the Marine Corps promoted him, although missing, to the grade of private first class.

Neil Sheehan, a civilian war correspondent during the Vietnam war, later wrote:

Those whom the Viet Cong thought they could convert to their cause . . . [they] "reeducated" . . . at clandestine prison camps in remote areas with indoctrination courses that consisted of work, lectures, political study, and primitive diet. The average confinement was three to six months, after which the prisoners were released.³⁶

In May 1967, after repeated indoctrination sessions, Garwood, like Sweeney and several other Americans before him, was offered his release. He was given, and for the remainder of his time in Vietnam carried, an undated "Order of Release."* It was written in English, apparently so Garwood would recognize its importance, and it bore the seal and authorizing signature of the "Central Trung Bo National Liberation Front Committee," apparently so any Vietnamese would similarly appreciate its significance. It read, in part:

Carrying out the lenient and humanitarian policy of the South Vietnam National Front for Liberation toward prisoner of war . . . Basing on the improvement of the prisoner. The Central Trung Bo National Front for Liberation decides The prisoner: Bobby R. Garwood . . . Captured on: September 28, 1965 at: Cam Hai village, Quangnam province be released. From now on Bobby can enjoy freedom and is not allowed to take arms or do anything against the South Vietnamese people.³⁷

Unlike those who had been offered release before him, Garwood declined and instead asked to join the

*After the conclusion of Garwood's general court-martial, his defense counsel inadvertently delivered the Order of Release, among a sheaf of other material, to Major Werner Hellmer, Garwood's prosecutor. Hellmer wrote, "I noticed that a piece of paper . . . was protruding slightly from one of the binders. When I first opened up the sheet it looked like the standard release order given other prisoners of war who were released [and returned to U.S. control] during the 1968-69 time frame. Upon closer examination I noticed Garwood's name, age and other information!" Here was proof that Garwood had been freed by his captors. (LtCol Werner Hellmer ltr to author, dtd 2Mar89, Garwood folder, Marines and Military Law in Vietnam file, MCHC.)



Marine Corps Historical Collection

The accused in the longest court-martial in Marine Corps history was Pvt Robert R. Garwood. His boot camp photograph was taken in October 1963.

National Liberation Front. He adopted the Vietnamese name Nguyen Chien Dau and joined the enemy. As a member of the Military Proselytizing Section of Military Region 5, he taped and wrote propaganda messages, made loudspeaker broadcasts near Marine Corps positions, and assisted in guarding and indoctrinating U.S. prisoners in the MR-5 POW camp located in the village of Tra Khe, Tra Bong District, Quang Ngai Province. Garwood lived with the camp guards outside the compound and, when not in the camp, was armed with a rifle or pistol. He dressed as the guards did and had freedom of movement both within and outside the camp. He frequently questioned U.S. prisoners and, as with Weatherman, continually urged them to "cross over," as he had. In a surprisingly short period Garwood became fluent in Vietnamese and often acted as an interpreter for the North Vietnamese when they interrogated American prisoners.

In July 1968 Garwood was given officer status in the National Liberation Front and promoted to a grade equivalent to second lieutenant.³⁸ About a year later, Garwood had a conversation with POW Bernhard Diehl, a German nurse who, along with four other German nurses, three of whom were female, had been captured by the North Vietnamese in April 1969. Diehl later related that he asked Garwood how he

U.S.M.C. J.L.
Central Prison
Board of Directors

ORDER of RELEASE

- Carrying out the lenient and humanitarian policy of the South Vietnam National Front for Liberation toward prisoner of war.
- Insure the improvement of the prisoner.
- In accordance with the Board of Directors of the camp.

The Central Prison National Front for Liberation decided:

The prisoner : *Bobby R. Garwood*
 No. : *21*
 Rank : *P.F.C.*
 Job : *Driver*
 Service number : *2063669*
 Unit : *3rd Division of US Marines*
 Native of : *Indiana*
 Captured on : *September 28, 1965*
 at : *Can hai village Suaynam province*

be released.

From now on *Bobby* can enjoy freedom and is not allowed to take arms or do anything against the South Vietnamese people.

GENERAL SECRETARY
PRISON COMMITTEE

Porter



Document courtesy of LtCol Werner Hellmer, USMC

Worn, faded, and folded after years of having been carried, Garwood's release order was evidence that he had been released in May 1967 and voluntarily remained with the enemy.

came to work for the Viet Cong, and Garwood responded, "I don't think the Americans have suffered any great loss because I chose to fight on the other side. In any case, so many Americans are fighting with the South Vietnamese; why shouldn't there be a few fighting with the North?"³⁹ Author John Hubbell wrote in his history of the Vietnam POW experience: "Bobby Garwood was hard to believe, but he was real,

a living breathing traitor who had taken up arms on behalf of the enemy and had no compunction about helping to hold American troops in vile captivity."⁴⁰

Treason is an offense not addressed by the Uniform Code of Military Justice. Aiding the enemy and misconduct as a prisoner, Articles 104 and 105, are military offenses, each punishable by confinement at hard labor for life.

Throughout the war reports were heard of "white VC," American turncoats engaged in combat on the side of the enemy. Several Americans were suspected of such activity, and Garwood was repeatedly mentioned in intelligence reports as possibly fighting for the VC.⁴¹ When guarding POWs, Garwood made no secret of his participation in combat against American forces.⁴² Army Sergeant First Class Robert Lewis, a prisoner for six years, recounted in a sworn statement: "Garwood told me on a couple of occasions that he was shot at by the U.S. forces he was talking to, and that he came very close to being captured by U.S. forces. Garwood often bragged about close calls he had."⁴³

On 15 July 1968 a 1st Force Reconnaissance Company patrol reported contact with a 20- to 25-man enemy force. At a range of 20 meters the Marines opened fire. Four patrol members identified one of the enemy as Caucasian, and they all heard him cry, "Help me!" as he fell, wounded. The patrol broke contact to escape the larger enemy force and reported that they had killed a Caucasian.⁴⁴ Based upon the patrol's report the 1st Battalion, 5th Marines searched the area of the contact for the body or a grave. "Suspect white male to be American reported in several other actions with NVA units," the battalion's orders read.⁴⁵ But neither body nor grave were found. The reconnaissance patrol's 10 members were shown photographs of captured and missing persons. Four believed that Garwood was the man they had shot. A message from III MAF to Saigon, substantiated by a later counterintelligence investigation, read, "it is considered probable that the Caucasian is in fact Garwood."⁴⁶ Army Private First Class James A. Strickland, a prisoner sometimes guarded by Garwood, said, after his release: "No, Bob Garwood wasn't killed by the Marine patrol. He left our camp in July He went to the hospital during this time [but] there was nothing to indicate Garwood had been wounded."⁴⁷ However, later medical examination of Garwood revealed, besides a preservice gunshot wound to his right upper arm, a gunshot wound in his right lower arm, as well as shrapnel wounds of the back, neck, and arm. Also, Garwood told examining doctors of having received blood transfusions after being wounded.⁴⁸

In September or October 1969, a year after the reconnaissance patrol's encounter with the white VC, Captain Martin L. Brandtner commanded Company D, 1st Battalion, 5th Marines in an operation in "Arizona Territory." During a firefight he saw a Caucasian who appeared to be pointing out targets for the ene-

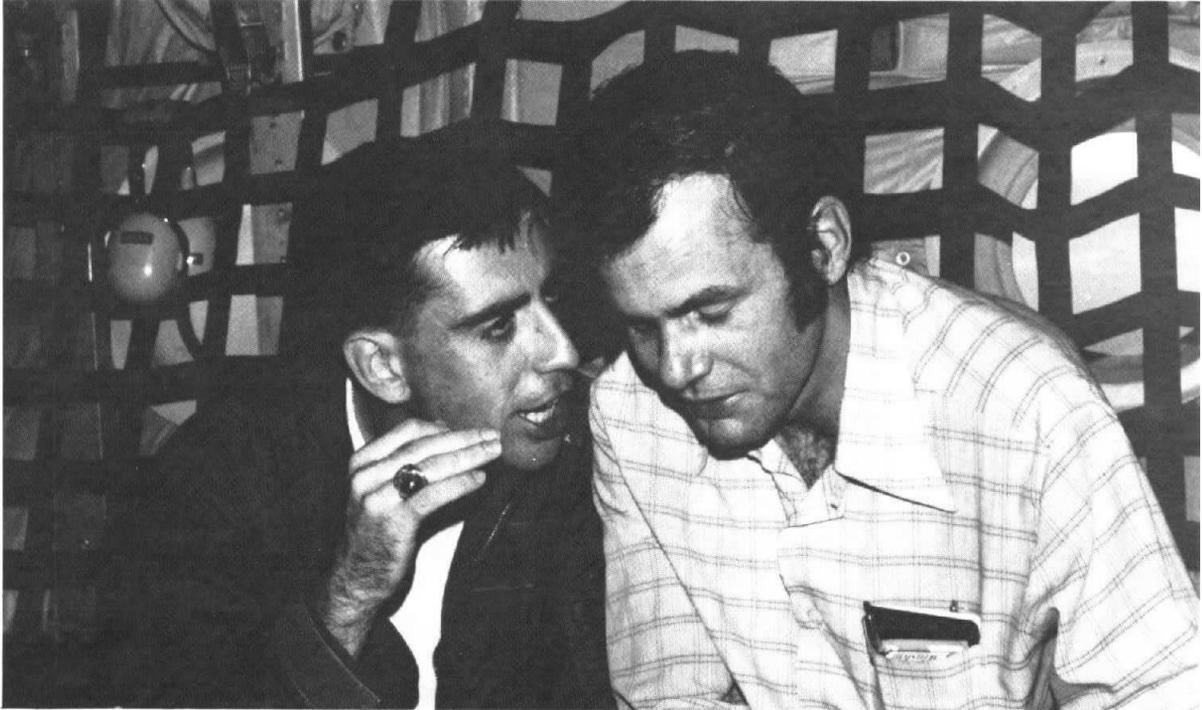
my. Even though the Marines fired at him the Caucasian did not appear to be hit. Captain (later brigadier general) Brandtner was aware of reports that Garwood was suspected to be in that area and believed the man he saw with the enemy was indeed Garwood.⁴⁹

After 1969 Garwood was not seen in the POW camps. A Headquarters Marine Corps POW screening board (a member of which was judge advocate Lieutenant Colonel Michael Patrick Murray) suggested in 1972 that he had "gone to Moscow for training," and concluded that "PFC Garwood is still alive and probably still aiding the VC/NVA in SVN."⁵⁰

In early 1979, in Hanoi, Garwood passed a note to a Finnish businessman associated with the United Nations: "I am American in Viet Nam. Are you interested? Robert Russell Garwood, 2069669 USMC."⁵¹ On 22 March, 13 years and 6 months after he was captured, Garwood flew from Hanoi to Bangkok and was met by a contingent of diplomatic, press, and military officials. Among them was Captain Joseph Composto, the Marine Corps defense counsel assigned to represent Garwood.

Robert R. Garwood, born in April 1946, had completed two years of high school with two arrests for minor offenses as a juvenile, before joining the Marine Corps.⁵² He had been on active duty for 23 months when he was captured. Before arriving in Vietnam, he had several psychiatric consultations and had been diagnosed as a "passive-aggressive personality with manipulative interpersonal relationships."⁵³ He also received nonjudicial punishment five times for minor infractions, usually involving brief unauthorized absences. Because his activities in the enemy camp had been known and corroborated by numerous intelligence sources, Garwood, unlike POWs, had not been promoted beyond the grade of private first class while in a missing status.

His return from Vietnam was carefully planned. Captain Composto noted that, "Planning and guidance came directly from CMC by classified message and secure voice transmission My job was to stand by and advise Garwood, should he desire it."⁵⁴ In Washington, at Headquarters Marine Corps' Judge Advocate Division, Lieutenant Colonel Brahms was detailed to coordinate legal aspects of Garwood's return, assisted by Captains William T. Anderson and James E. L. Seay, who addressed military justice and administrative law issues, respectively.⁵⁵ The Commandant, General Louis H. Wilson, Jr., wanted to ensure that Garwood was treated no differently than any other Marine returning from a lengthy unauthorized ab-



Marine Corps Historical Collection

Just after his release, Garwood and his appointed military counsel, Capt Joseph Composto, talk over the roar of a C-130's engines on the flight from Bangkok, Thailand, to Okinawa.

sence. General Wilson took pains to ensure that if court-martial charges were brought against Garwood the case would not be complicated by failure to promptly advise him of his rights, including those to counsel and against self-incrimination. In a letter to the Deputy Assistant Secretary of State coordinating Garwood's return, General Wilson wrote: "I must insist that the following sequence of events take place to insure that full legal rights of PFC Garwood are protected," and he detailed the scenario he required, "Immediately, repeat immediately, advise Garwood of his full legal rights. This advice must be the first words spoken to Garwood The warning must be witnessed by a third party A tape recording of the foregoing events will be made."⁵⁶ The Commandant went on to specify the precise wording of the warnings to be given, essentially those given prior to questioning any suspect. General Wilson's instructions were carried out, witnessed in writing by the American Consul in Bangkok.⁵⁷

Garwood's biographers, in an otherwise negative assessment of the military, describe his court-martial saying: "There was a certain correctness in everything the Marine Corps did, an air of playing fair. Hard but fair."⁵⁸ Garwood's court convened at Camp Lejeune,

North Carolina, on 11 March 1980. Garwood, then a 33-year-old private first class, pleaded not guilty to desertion, soliciting American forces to refuse to fight and to defect, maltreatment of two American prisoners he was guarding, and communicating with the enemy by wearing their uniform, carrying their arms, and accepting a position as interrogator/indoctrinator in the enemy's forces. The maximum punishment for the combined offenses was death, but the base commanding general, the convening authority, referred the case to trial as noncapital.

Pretrial motions and unforeseen delays pushed the actual trial back more than eight months.⁵⁹ The military judge was Colonel Robert E. Switzer. Initially, Garwood was defended by Mr. Dermot G. Foley of New York City. Defense counsel Captain Composto was released by Garwood, as was a second appointed defense counsel, Captain Dale W. Miller, both of whom had tactical differences with Mr. Foley. A month after the trial opened, Captain Lewis R. Olshin was appointed as military defense counsel. Still later, but well before the first witness appeared, Mr. John Lowe of Charlottesville, Virginia, a former Army judge advocate, joined the defense team as lead counsel. Two weeks later he was joined by his associate, Mr. Vaughn



Marine Corps Historical Collection

Garwood's military counsel during his general court-martial was Capt Lewis R. Olshin. The last of three military lawyers who represented Garwood, Capt Olshin was appointed a month after the court convened.

E. Taylor. Reflecting dissension in the defense camp, Mr. Foley left the case shortly after the arrival of Lowe and Taylor, taking with him many critical defense files. Mr. Taylor, newly discharged from the Army, had recently been an instructor at the Judge Advocate General's school, where he had a large part in drafting the mental responsibility instructions included in the military judges' handbook. The crux of the defense case was to be Garwood's mental responsibility.

Trial counsel was Captain Werner Hellmer (recently selected for promotion to the grade of major), assisted by Captain Teresa J. Wright. Ironically, Marine Captain Hellmer had attended the Army's JAG school where one of his instructors had been then-Captain Taylor. Captain Hellmer came late to the prosecution, after the trial counsel who had conducted the Article 32 investigation returned to civilian life. Adding to Captain Hellmer's considerable burden, the Garwood trial was the first general court-martial he had ever participated in.

The case was tried before five officer members. Over 11 days the government presented its case-in-chief

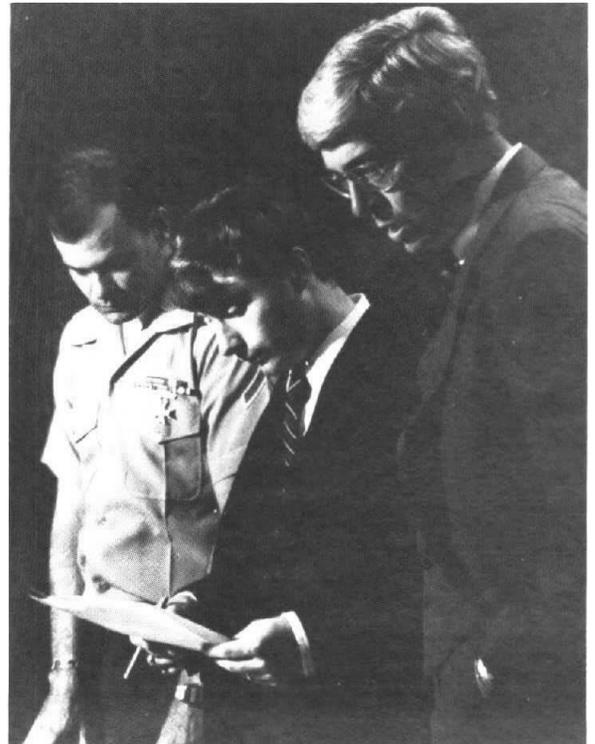
through 14 witnesses, nine of whom were former POWs. The month-long defense case was primarily psychiatric testimony urging that Garwood's initial captivity had been so brutal as to cause him to act as he later did without the mental responsibility necessary to make his acts punishable.

Throughout the Vietnam War and its aftermath civilian defense lawyers often prevailed in courts-martial of heightened visibility and public interest. On 5 February 1981 it was the Marine Corps' and Major Hellmer's turn. Eleven months after convening, after 92 trial days, more than 60 defense motions, 3,833 pages of transcript, and two days of deliberation by the members, Garwood was convicted of communicating with the enemy and assaulting a POW. He was sentenced to reduction to private, loss of all pay and allowances, and a dishonorable discharge. No confinement was imposed and Garwood was immediately discharged from the Marine Corps.

Like Edison Miller's case, Robert Garwood's inched through military appellate forums and civilian courts for several more years. While his case was still under appellate review, Garwood sought immunity for any

PFC Garwood's civilian defense team, shown during trial. Garwood stands beside former Army judge advocate Vaughn E. Taylor, center, and John Lowe.

Marine Corps Historical Collection





Marine Corps Historical Collection

Trial counsels in the Garwood court-martial were Captains Werner Hellmer and Teresa J. Wright. The conduct of the military judge created potentially serious appellate issues.

offenses he might be charged with having committed between 1970 and 1980—the years when charges of collaboration were still a possibility if new evidence arose—in return for information he claimed to have regarding American POWs still in enemy hands. But there was “a real possibility that the Court [of Military Appeals] may reverse the court-martial conviction,” wrote the General Counsel of the Navy.⁶⁰ In a handwritten addendum to his memorandum to Secretary of the Navy John Lehman, the General Counsel added: “This guy will cause lots of grief irrespective of what is done. He’s no good and I wouldn’t believe him.”⁶¹ General Paul X. Kelley, Commandant of the Marine Corps, agreed, saying: “I find this whole business to be repugnant. How do we explain a grant of immunity to the families of the 50 thousand KIAs in RVN?”⁶² Immunity was not granted and no information was offered by Garwood.

The principal issue on appeal and the basis for the General Counsel’s fear that the case might be overturned, was the conduct of the military judge, Colonel Switzer, during trial. While the court-martial was in progress, and in violation of his own instructions, he had granted several interviews to reporters, and had been interviewed on the CBS Evening News and the ABC program, “Nightline.” In those interviews he voiced his opinions of the defense trial tactics, credibility of a defense witness, and the relevance of cer-

tain evidence. In a decision eventually concurred in by the United States Court of Military Appeals, Marine Corps Colonel James S. May, an appellate judge on the Court of Military Review, wrote: “We find inexcusable the decision by the trial judge here to involve himself in the clearly predictable media interest in this case There is very simply, no justification or excuse.”⁶³ But the court went on to note that the judge’s indiscretions were not shared by or with the members who had decided Garwood’s guilt or innocence, and that the military judge had maintained an unbiased in-court decorum throughout the trial. Garwood’s conviction was affirmed by the Court of Military Review and, later, the Court of Military Appeals. His later appeal to the United States Supreme Court was denied.⁶⁴

Although Garwood was not promoted beyond private first class while he was classified as missing, the lesson of the Sweeney case had been forgotten, for neither had he been declared a deserter.^{65*} Neverthe-

*In 1977, a Headquarters Marine Corps POW screening board had recommended that Garwood’s status be changed from prisoner of war to deserter. At the time of his return to U.S. control that administrative action had not been completed, though his conduct was documented and well-known. (HQMC, Judge Advocate Division comment on Review Board Report RLP:caw of 28Sep77, dtd 29Aug78. Garwood folder, Marines and Military Law in Vietnam file, MCHC.)



Marine Corps Historical Collection
PFC Robert R. Garwood was the only Marine convicted of misconduct while in the hands of the enemy. Here he appears to be wearing a POW bracelet.

less, upon his return from Vietnam his application for almost 14 years' back pay was refused by a Marine Corps disbursing officer. Deserters may not be paid for the period of their desertion, and the disbursing officer, supported by Headquarters Marine Corps, considered Garwood to have been a deserter from the date of his initial capture, despite the lack of official classification as such. Several months before his court-martial convened, Garwood filed suit in the U.S. Court of Claims for \$146,749.24 in back pay and allowances, as well as for promotions that were, he alleged, wrongfully denied him. The Court of Claims case was stayed until the court-martial proceedings were concluded. On 6 September 1984, three and a half years after his court-martial conviction, the U.S. Claims Court (formerly the U.S. Court of Claims) granted the government's motion for summary judgement, thereby denying Garwood's claim to back pay and promotions.⁶⁶

The longest and most expensive court-martial in Marine Corps history was over. Colonel Joseph R. Motelewski, who had been the chief of staff of the 3d Marine Division in Vietnam, was the convening

authority's staff judge advocate during Garwood's pretrial maneuvering. He noted:

I recommended, initially . . . that we should never try the Garwood case; that we should give him an administrative discharge . . . Give him a kick in the ass and send him out, and it wouldn't have cost us a penny . . . Every witness that we had to call back, primarily, was a former prisoner of war, and if anybody knows anything about prisoners of war, those guys went through hell. They all had to come back and . . . admit to the public those things which they had done under horrible conditions . . . I worried about the Garwood case.⁶⁷

But, as Admiral Stockdale suggested in alluding to Garwood's psychiatric defense, other considerations were involved in bringing Garwood to justice:

I . . . hope that America will salvage from the tragic case of PFC Robert R. Garwood . . . a clear definition of the standard of conduct to be demanded of any future POWs . . . To try to claim "brainwashing" or "breaking" would never do. It just doesn't happen that way . . . Prisoner misconduct charges . . . do not pertain to pain thresholds, depression of isolation, interrupted consciousness, discontinuities of judgement patterns or temporary factors of any sort. The charges are about character . . . Garwood's case is a particularly sad case, but to conclude from it that one's responsibility for long-term actions can be absolved by some sort of hypnotic "whammy" . . . would be dead wrong.⁶⁸

Why was Garwood tried, while others, including a Marine Corps lieutenant colonel, were not? That question, too, was an appellate issue addressed by the Court of Military Review. The court wrote: "the specific circumstances of this case are an appropriate reference point to determine the extent, if any, of arbitrariness."⁶⁹ They found, as did the court of Military Appeals, that Garwood was in a category by himself: "We have some doubt whether he even makes a colorable claim that there were others similarly situated against whom his treatment can be measured."⁷⁰

Garwood was the only former prisoner of war of any Armed Service convicted of acts committed while with the enemy—not for acts committed while a prisoner, for his prisoner status ended the day he refused release and asked to remain with the enemy. Robert R. Garwood *was* the enemy.

Mopping Up

Drugs, Race, Dissent: Same Problems, New Venues—Vietnam Finale: Bien Hoa and the Rose Garden Perspective—The Uniform Code of Military Justice: Did It Work in Vietnam?—Summation

American forces continued to redeploy from Vietnam after the last combat unit left Da Nang and while the prisoner of war cases were progressing toward resolution. Meanwhile, on Marine Corps bases throughout the world, issues and problems that arose during the war continued to affect not only lawyer's caseloads, but morale and readiness as well. Drug use remained endemic. Racial conflict continued to divide the ranks. Dissent and disobedience still plagued commanders. Judge advocates remained overburdened with cases, some of which had arisen in Vietnam to be tried elsewhere. Marines of every occupational specialty continued to deal with the aftermath and echoes of the war long after the last round was fired.

Drugs, Race, Dissent: Same Problems, New Venues

A month after the Marines left Vietnam, Lieutenant General William K. Jones, Commanding General, Fleet Marine Force, Pacific, in addressing a symposium of general officers at Headquarters Marine Corps, said:

Drug abuse, racial incidents, permissiveness fallout. This triple challenge is not an easy one to grasp and it is going to be even more difficult to solve We can issue directives and these will have the same general effect as the old "There will be no more V.D." orders. Yet, there must be solutions and we must find them, quickly.¹

General Leonard F. Chapman, Jr., Commandant of the Marine Corps, added, "There are organizations like the Movement for a Democratic Military that advocate eliminating discipline in the Armed Forces. They advocate such things as electing officers . . . eliminating the Uniform Code of Military Justice, and the like."² Civilian labor unions attempted unionization of the Armed Forces. Later, General Robert E. Cushman, Jr., General Chapman's successor as Commandant, recalled with frustration:

Vietnam was over, yet we were still being told to take . . . so many Group IVs We just had a hell of a time with quality I was always massaging the numbers and trying to get the mental Group IVs down to the lowest possible level and the high school graduates up as far as we could You had to lower your standards somewhat to keep the number of people up to near the authorized strength.³

To maintain Congressionally ordered manpower levels without accepting an excessive number of margi-

nal recruits, or discharging large numbers of substandard Marines, the flow of administrative discharges was curtailed in 1972. Brigadier General William H. J. Tiernan, a former Director of the Judge Advocate Division, noted that "the situation was a classic 'Catch 22.' On the one hand, we were bogged down with thousands of substandard individuals who never could be productive Marines, and on the other hand we were imposing quotas on the number we could dispose of out of fear of a declining end strength."⁴ Nevertheless, Major General Edwin B. Wheeler, the Marine Corps' manpower chief, told commanders that "in the past, our approach has been, 'If they don't measure up, kick 'em out.' Our course now, in order to preserve our numbers is: 'If they don't measure up, work with them until they do.'"⁵ The tilt towards numbers as opposed to quality was supposed to be overcome by traditional Marine Corps leadership skills, but that hope was not fulfilled. Discipline suffered and court-martial rates increased. Desertions rose until, in 1975, the desertion rate was the highest it had ever been. General Louis H. Wilson, Jr., who succeeded General Cushman as Commandant in 1975, wrote in a report to the Senate Armed Services Committee:

Recent criticism of the quality of Marine Corps personnel is largely founded in such categories as unauthorized absence, desertion, drug abuse, and enlistment of non-high school graduates. These problems stem almost entirely from past acceptance of excessive numbers of substandard applicants The Marine Corps . . . enlisted a significant number of persons who simply did not meet existing quality standards, a fact reflected in subsequent disciplinary statistics.⁶

The Commandant continued:

Marine Corps court-martial rates have tended to be higher than those of the other services. This condition can be explained in part by the fact that the Corps has a much higher percentage (55 percent in FY 75) of personnel under 22 years of age than the average for all the military services (34 percent in FY 75). A second factor has been the fact that Marine Corps commanders have consistently adhered to high standards . . . and disciplinary processes have resulted in punishments that reflect this.⁷

Upon becoming Commandant, General Wilson directed a return to higher disciplinary standards without regard to maintaining numbers. "If we can't

find enough fine young men who want to bear the title 'Marine,' then we're simply going down in strength."⁸ He ordered the early discharge of over 4,000 marginal and unsuitable Marines and initiated new recruiting standards that emphasized high school graduation as a prerequisite to enlistment.⁹ It took time for those initiatives to have effect in the field. Meanwhile, through the mid-1970s judge advocates mopped up the disciplinary aftermath of the war. Brigadier General John R. DeBarr, Director of the Judge Advocate Division from 1973 to 1976, recalled: "Those were tough years." He noted that at one time, besides the usual courts-martial, 20 cases were pending in various Federal District courts in which the Marine Corps was the defendant. Most of those suits were brought by disgruntled Marines over such things as haircut regulations.¹⁰

Low quality enlistees continued to join the Marine Corps through the early 1970s, but slowly the results of higher enlistment standards began to show. Enlistment of high school graduates rose from a 1973 low of 46 percent to 74 percent in 1976.^{11*} The enlistments of previously recruited "Cat IVs" were completed. Others who did not meet disciplinary standards were administratively discharged.

In 1971, 634 general and 5,835 special courts-martial were tried throughout the Marine Corps. In 1972, although Marine Corps strength dropped seven percent, general courts-martial rose slightly, and special courts lessened only minimally. In 1974, when low quality Marines who had enlisted in 1973 joined their units, 521 general and 7,690 special courts were tried, an increase of 17 percent over the preceding year's totals despite a four percent drop in strength. But in 1975, when manpower increased four percent, courts-martial dropped 17 percent, to 395 generals and 6,413 specials. That year, 1975, was the beginning of a long upward trend in the quality of recruits and a long downward trend in disciplinary cases.¹²

Another long-standing problem area, racial conflict, was attacked on a broad front. A human relations training program was initiated by Headquarters Marine Corps in 1972, and 113 instructors were assigned exclusively to human relations duties at major Marine Corps commands. The program required 20 hours of

guided instruction for all Marines, officer and enlisted, in racial issues. The Marine Corps Human Relations Institute at San Diego, California, was designated a formal Marine Corps School. The Advisory Committee for Minority Affairs, composed of prominent minority civilians, advised the Commandant on equal opportunity matters.¹³ Bernard C. Nalty, author of a history of black Americans in the military wrote: "These efforts seemed to be paying off . . . Compared with the draftees inducted during the latter stages of the Vietnam War, the black volunteers [of the mid-1970s] were less likely to be streetwise advocates of black power who would take offense at injustices, real or imagined, and lash out violently."¹⁴

From 1970 to 1975 reenlistment rates rose and desertion rates fell.¹⁵ Drug use remained high, but showed signs of abating.** By 1975 the problems that had plagued all of the Armed Forces continued, but they were easing significantly.

A poll of 7,000 Marines of all grades, released in 1972, indicated confidence in the military justice system. Asked if they would prefer trial by civilian or military court, if charged with an offense, sixty percent of the anonymous respondents indicated they believed a military court-martial was as fair or fairer than civilian courts. That result was constant regardless of race. The same confidence was not expressed in military lawyers, however. By a margin of almost two to one, the Marines polled preferred a civilian lawyer over a judge advocate. The poll ascribed no reasons for the lack of confidence in Marine Corps lawyers, but the younger the respondent and the more junior in grade, the greater the preference for civilian counsel.¹⁶

Vietnam Finale: Bien Hoa and the Rose Garden

In Vietnam the war continued after the Marines withdrew. In May 1972, responding to a determined enemy offensive and a request by the South Vietnamese government, portions of the 1st Marine Aircraft Wing revisited Vietnam. Marine Aircraft Group (MAG)-15, returned to Da Nang, and MAG-12 transplanted to Bien Hoa, just north of Saigon. In June

*Ten years later, in 1988, 98 percent of all enlistees would be high school graduates. Category IV (Cat IV) enlistees for the years 1986, 87, and 88 would total less than one hundred, less than 0.2 percent of all enlistees. (*Navy Times*, 6Mar89, p. 6.)

**In a 1971 survey of 6,669 anonymous Marines, conducted by FMFPac's Operations and Analysis Branch and Human Affairs Division, 48 percent of the respondents indicated they had used drugs at one time or another, 44 percent of that group indicating first use in the Marine Corps, 59 percent indicating use of LSD at least once, and 20 percent indicating use of heroin. (Analysis, FMFPac Human Affairs Poll folder, Marines and Military Law in Vietnam file, MCHC.)



Marine Corps Historical Collection

The Commandant of the Marine Corps, Gen Leonard F. Chapman, Jr., poses with the Advisory Committee for Minority Affairs. The 12 civilians advised the Commandant on equal opportunity issues and ways to ease racial tensions within the Marine Corps.

MAG-15 moved westward from Da Nang to a remote Royal Thai Air Force Base at Nam Phong, Thailand, and was redesignated Task Force Delta.¹⁷ Combat air sorties would be flown over Vietnam by U.S. aircraft based at both Nam Phong and Bien Hoa. Nam Phong was shared with Royal Thai Air Force personnel, including 200 Thai security guards. The threat from Communist forces was minimal, although in September and October 1972 several U.S. Air Force bases in Thailand were attacked. During the Marine Corps' tenure, however, there was no ground combat at Nam Phong.

Because of its remoteness and inhospitableness, Nam Phong was facetiously referred to as "The Rose Garden," a nickname adopted from a Marine Corps recruiting slogan of the day, taken in turn from a then-popular song, "I Never Promised You A Rose Garden." The nearest town, Khon Kaen, was 15 miles away.

Advance elements of Task Force Delta arrived at the Rose Garden on 24 May 1972 when Seabees began base construction and erection of tents and the familiar SEAhuts. Lieutenant Colonel Raymond W. "Wes" Edwards became the SJA of the 1st Marine Aircraft Wing a few days later.

First commissioned in 1953, Lieutenant Colonel Edwards had been an artillery officer for 16 years and obtained his law degree during off-duty hours.¹⁸ From Iwakuni, Japan, he directed the wing's lawyers throughout the Nam Phong-Bien Hoa deployments. He recalled that "the delivery of legal services during this period was amazing. The 1st Wing had units in mainland Japan, Okinawa, . . . the Philippines, Republic of South Vietnam (2 locations) and in Thailand, as well as units afloat Logistically it was a nightmare."¹⁹ Shortly after his arrival at Iwakuni Lieutenant Colonel Edwards accompanied the wing commander on a week-long trip to Nam Phong to determine how his judge advocates could best serve the task force. He had been to Nam Phong before. In 1966, as the Plans Officer of 9th MAB/Task Force 79, he had surveyed Northern Thailand to locate potential contingency air fields. He had selected Nam Phong.²⁰

Initially, legal service for the Rose Garden was provided from Bien Hoa, Vietnam. Because of the lawyer's low air travel priority, that was impracticable and legal personnel were moved to the Rose Garden, itself. Lawyers and clerks at both Bien Hoa and the Rose Garden would be rotated to and from Iwakuni every



Marine Corps Historical Collection
The Staff Judge Advocate of the 1st Marine Aircraft Wing in 1972 was LtCol Raymond W. Edwards. Shown in a 1975 photograph as a colonel, he directed the judge advocates at the Rose Garden and at Bien Hoa.

30 days. That, too, proved impracticable. Rose Garden deployments were lengthened, generally, to six months, although deployments from Iwakuni remained flexible and responsive to individual circumstances.

In June 1972 the branch law office at the Rose Garden was opened and was initially manned by Captains Michael C. Warlow, the officer-in-charge of legal personnel, and William D. Blunk. Master Sergeant William C. Davis, the legal chief, and a court reporter/legal clerk, rounded out the four-man legal section. They had no office and worked wherever they could find space. In October Captains Warlow and Blunk were relieved by Captains Richard L. Prosis, the new officer-in-charge, and Daniel Parker, Jr. Captain Vincent J. Bartolotta, Jr., arrived in December 1972 and remained until the base was turned over to the host nation 10 months later. Several other judge advocates, including Captains Keith E. Rounsaville, Robert E. Hilton, Van E. Eden, and Stephen C. Eastham, rotated through the Rose Garden during the legal office's 15-month tenure there.²¹

Living and working conditions were Spartan. Task Force Delta's 3,200 officers and men originally anticipated remaining in Thailand no longer than 90 days, but the deployment was repeatedly extended.²² As a result, facilities improvements were delayed in antici-

Nam Phong, Thailand, "The Rose Garden," shown after the base was well-established. The legal office is center, under the trees to the right of three trailers in the shape of an "H."

Marine Corps Historical Collection



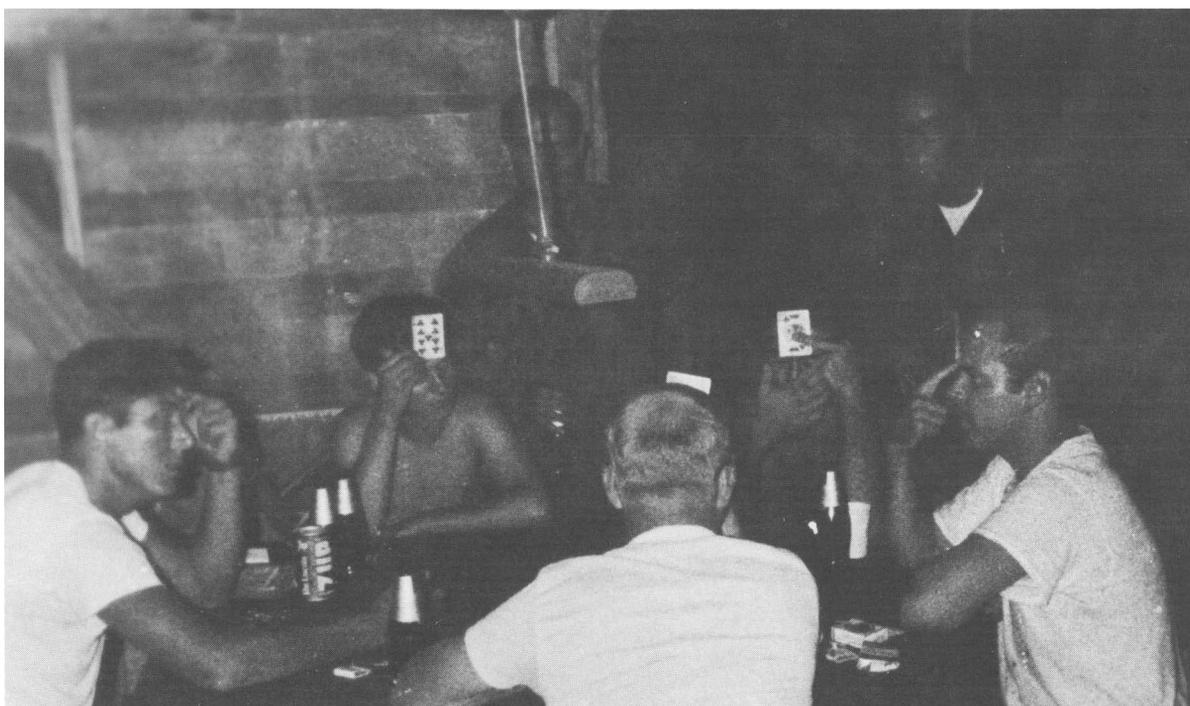


Photo courtesy of Mr. Vincent J. Bartolotta, Jr.

Recreational opportunities at the Rose Garden were few. Capt Vincent J. Bartolotta, Jr., left, plays liar's poker with an unidentified PFC, and a Navy doctor, dentist and chaplain.

Shortly after the Rose Garden was established, the enlisted legal clerks lived in this shabby hardback tent. Within a few months they moved to a more comfortable SEAhut.

Photo courtesy of Col A. F. J. Mielczarski, USMC



pation of a continually receding withdrawal date. Tents, cots, and water in five-gallon cans were the rule. The first court-martial was tried in the chapel. When a SEAhut was eventually provided the legal section, cases were tried there. The billeting spaces of the lawyers and clerks were at one end of the hooch, and field desks and office gear at the other end. Before court was convened, the lawyers would just rearrange the desks. Eventually, the enlisted reporter/clerks were provided separate living spaces.

Large rats infested the Rose Garden and the Marine SEAhuts. When Task Force Delta's aviator commanding general loaned Captain Prosis some rat traps, Captain Prosis noticed the general's prominent office wall display of spray-painted rat silhouettes, commemorating the general's numerous kills.²³

Courts-martial were difficult to conduct so close to the flight line. The parties to the trial paused in mid-sentence, while aircraft took off on afterburner. The closed mask reporting system required the reporter to speak into a microphone encased in an oxygen mask-like device held directly to his face. The discomfort

the mask caused in the heat of the Thai summer led to open-microphone recording of courts on cassette recorders. The microphone was simply passed back and forth between the reporter and the person speaking.²⁴

The Bob Hope USO Christmas show played at the Rose Garden on 23 December 1972. An unexpected result was easier trial of courts-martial. An air conditioned trailer van, one of several employed at the Rose Garden as aircraft ready-crew sleeping vans, was cleared and set aside as a dressing room for the troupe's female members. Immediately after the show and before the van could be returned to its proper location, defense counsel Captain Bartolotta, borrowed the trailer and had it moved to another portion of the camp, where a makeshift bench was quickly installed. "Thereafter, we convinced the chief of staff that the command needed some sort of decorum for their legal proceedings, and we got to keep our 'courtroom' until we closed the base," he recalled.²⁵ After having perfected their claim to it, legal personnel frequently slept in the courtroom trailer when trials were not in progress.

The Bob Hope Christmas show played at the Rose Garden in December 1972. The show led to an unexpected bonus for the branch legal office: an air conditioned van.

Photo courtesy of Mr. Richard L. Prosis





Photo courtesy of Mr. Vincent J. Bartolotta, Jr.

The Rose Garden's temporary detention facility was crude but effective. Marine Corps defense counsels preferred to visit their clients at the U.S. Army's brig at Pattaya Beach.

An "ad hoc" special court-martial military judge from Iwakuni, initially Captain Richard D. Sullivan, spent several days each month at the Rose Garden.²⁶ During that time the judge would try the cases that had been readied since his last visit. Later military judges were Captains Michael C. Vesey, Charles R. Oleszycki and Franklin D. Holder, and Major Anthony F. Mielczarski. The judges found that flights from Iwakuni to the Rose Garden were long and circuitous. Additionally, they were often bumped from their aircraft en route to Nam Phong. To make their flights more certain, if not shorter, Lieutenant Colonel Edwards arranged for military judges to be designated as couriers, which gave them a transportation priority that precluded their being bumped.

In January 1973 a rudimentary temporary detention facility was constructed to hold prisoners awaiting transportation to the brig at Iwakuni or on Okinawa. The U.S. Army brig near Pattaya Beach, south of Bangkok, was usually used for pretrial confinement, however. Recalling the beauty of Pattaya Beach, Captain Bartolotta said that "once we realized that the counsel for these defendants would have to go to this brig to interview his clients prior to trial

[defense counsel] became a much sought-after assignment."²⁷

The caseload hovered around four or five special courts-martial per lawyer. Only four general courts-martial arose during the Marine Corps' stay at the Rose Garden. Three of them were transferred to Iwakuni for trial. The fourth, an attempted murder case prosecuted by Captain Rick Prosize and defended by Captain Daniel Parker, was tried in the Rose Garden messhall. The ubiquitous Colonel Donald E. Holben, once again a general court-martial military judge, came from Yokosuka, Japan, to hear the case. Corporal Clifford K. Somerville, who shot and wounded a staff sergeant with a .38 caliber revolver after having been put on report, was tried over the course of five days in February 1973. The wounded staff sergeant testified to Somerville's good character and prior good record, following his conviction. Somerville was sentenced to confinement at hard labor for two years, reduction to private, loss of pay and allowances, and a dishonorable discharge.²⁸

Many courts involved Marines sent from the 3d Marine Division on Okinawa to assist the Thai police in camp security. Lieutenant Colonel Michael Patrick

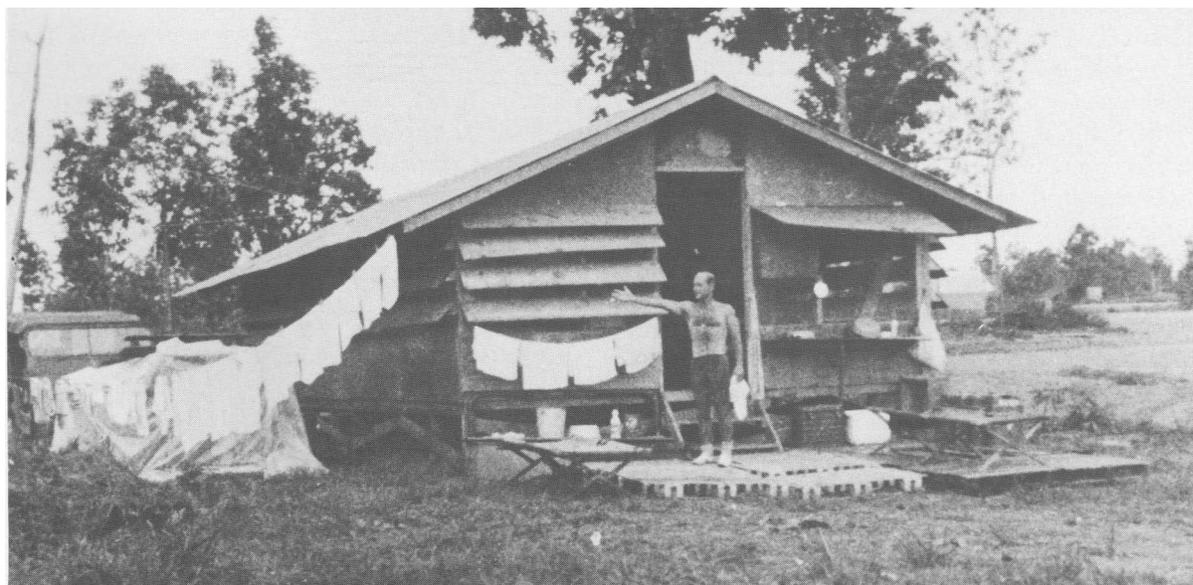


Photo courtesy of Mr. Vincent J. Bartolotta, Jr.
The Rose Garden's courtroom trailer, center, was a former aircraft crew sleeping van. The spectator's section of the makeshift courtroom was deep, but narrow.

Murray, who relieved Lieutenant Colonel Edwards as SJA, said of those Marines, "[the Rose Garden] did not get the cream of the crop. They got the shitbirds and troublemakers, and with them came many of the problems, particularly racial."²⁹ In July 1973 there was a cross-burning incident involving white Marines, followed by a racially instigated riot in the messhall in which eight Marines were injured.

In 1972, when 1st Marine Aircraft Wing lawyers were assigned to the Rose Garden, this SEA hut was both quarters and courtroom. Here, Capt Robert E. Hilton enjoys the view.

Photo courtesy of Mr. Vincent J. Bartolotta, Jr.



There was no status-of-forces agreement (SOFA) with the Thai government, which sometimes resulted in jurisdictional disputes with Thai police. That situation was made more difficult by the lack of availability of Thai lawyers to assist in representing Marines in Thai criminal proceedings, or in disputes with Thai nationals. In such cases the Rose Garden judge advocates telephoned U.S. Air Force lawyers at Udorn for advice and assistance. A Thai attorney employed by the Air Force grudgingly assisted Marines in legal difficulty, most of which resulted from drug involvement. As Lieutenant Colonel Edwards noted, "Beer, soft drinks, PX supplies, liberty, etc. were in limited supply, but drugs weren't."³⁰

Drug use was the most common offense at the Rose Garden, despite an aggressive drug abuse prevention program. If anything, drugs and marijuana were more readily available in Thailand than in Vietnam. Early on Thai nationals began aggressively marketing marijuana to the troops. Marijuana cigarettes, often laced with heroin, came in packs of 20 for less than a dollar. Thai stick, marijuana soaked in water and dried into a cigar-like shape, was frequently encountered. Heroin was widely available and, alarmingly, was more frequently the basis for charges than was marijuana. Incoming mail was examined by drug detection dogs and outgoing mail by U.S. customs personnel. Marine passengers on buses to and from liberty spots were routinely searched at the camp gate. In Au-



Photo courtesy of Mr. Richard L. Prorise

In the new Rose Garden legal office, Capt Richard L. Prorise anticipates opening a package from home. As in the old office, the lawyers' quarters are just behind the partition.

gust 1972 random urinalysis testing began, and within a few months an average of 1,900 such tests were conducted monthly.

After the Vietnam cease-fire took effect on 27 January 1973, Rose Garden combat flights were redirected against Laotian and Cambodian targets. When bombing throughout Indochina was halted on 15 August 1973, Task Force Delta began to redeploy to Iwakuni and Okinawa.

On 10 July 1973 Lieutenant Colonel Murray relieved Lieutenant Colonel Edwards as the Wing SJA and later directed the withdrawal of legal personnel from the Rose Garden, assisted by his deputy, Major Joseph J. Hahn, Jr. On 6 September the Nam Phong facility was turned over to the Government of Thailand. The last Marine departed on 21 September.

While the Rose Garden grew, other judge advocates from Lieutenant Colonel Edwards' 10-lawyer office in Iwakuni were deployed to Bien Hoa Airbase, a long-established Vietnamese airfield several miles north of Saigon, where the lawyers served their temporary duty in a more comfortable setting. Marine Corps aircraft from MAG-12 were based there from May 1972 until the March 1973 cease-fire.³¹ The first judge advocate to arrive at Bien Hoa was Captain John T. John, accompanied by a court reporter/legal clerk. While two attorneys usually manned the Rose Garden, Bien Hoa rarely had more than one. When a court-martial was pending, another judge advocate and a military judge would fly in from Iwakuni. They enjoyed air condi-

tioned quarters and an air conditioned trailer in which to work. The few courts-martial were tried in a courtroom on board the base. Captain Rick Prorise, one of the Rose Garden judge advocates who often flew to Bien Hoa for cases, noted, "Bien Hoa . . . was not what I expected it to be. It had an air conditioned theater, air conditioned quarters, a nice-sized PX, an officers' club with good food and frequent bands, a bank, several tennis courts and even a swimming pool."³² Bien Hoa was also subject to frequent enemy rocket attacks, and the lawyers' office trailer was later damaged by rocket fire but, as Captain Prorise recalled, "the only casualty at Bien Hoa during the last months of the war was a dog on the Vietnamese side of the base . . . I had come too late to find the war."³³

There was one attempted fragging at Bien Hoa, in which the evidence was too inconclusive to bring the suspect to trial.³⁴ For the most part, disciplinary problems were few, and near the end of 1972 Lieutenant Colonel Edwards withdrew his clerks and lawyers to Japan.* All Marine Corps personnel returned from Bien Hoa to Iwakuni by 3 February 1973.³⁵ For the few weeks between the Bien Hoa legal office's closing and the return of MAG-12 to Japan trial teams

*Following duty as SJA of the 1st Marine Aircraft Wing, Colonel Edwards went on to be SJA of the Marine Corps Development and Education Command, then an appellate judge on the Navy-Marine Corps Court of Military Review, and Assistant Judge Advocate General of the Navy for Military Law. In July 1984, he retired with the grade of brigadier general.



Photo courtesy of Mr. Richard L. Prorise
At Bien Hoa, Vietnam, in 1973, the 1st Marine Aircraft Wing branch legal office shared space with the public information office. The signs on the door read: "MAG 12 Law Center," and "Press Center, PIO."

from Iwakuni were available. Captain Rick Prorise, the final 1st Marine Aircraft Wing judge advocate assigned temporary duty at Bien Hoa was probably the last Marine Corps lawyer to have been in Vietnam.

Perspective

After the war, a number of rehearings—retrials—were held in military courtrooms in the United States. The rehearings were cases originally tried in the combat zone in which the result had been set aside upon appellate review. They were usually the most serious of cases. Problems of proof inherent in retrying offenses long past, committed at scenes far away, often led to “not guilty” findings.³⁶ The courtroom echoes of Vietnam were a long time dying.

At war's end other issues faced Marine Corps judge advocates. Still alarmed by the lawyer retention issue, Brigadier General Duane L. Faw, Director of the Judge Advocate Division, conferred with the Commandant. General Faw recalled the meeting:

He said, “We’re having deep trouble with our lawyers now, and your job is to retain them.” I said, “General Chapman, I know what to do to retain lawyers, if you will give me the authority to do it One of the problems, of course, is our personnel assignment problem. I would like to handle all of these through the Judge Advocate Division.” He said, “Fine. You have it.” Just like that!³⁷

General Faw had been granted a unique authority. Thereafter, the Judge Advocate Division, with the cooperation and approval of the Personnel Division, orchestrated the assignment and transfer of the relatively small legal community. General Faw recalled: “I felt that we needed to offer some stability to in-

dividuals When they finished an overseas tour I would offer them a stabilized tour that would hold them as high as six years at the same post or station, if they wanted it, so their wives could get a job, their kids could go to one high school.” The Assistant Commandant, General Earl E. Anderson, noted that the artillery community, for example, would like a deal such as the lawyers had. General Faw had a response: “I told him that I had to retain lawyers, and that a ‘cannon cocker’ couldn’t go out there and get a job cocking cannons at 10 times the pay, like my lawyers could . . . and if I’m going to have the job of retaining them, I’ve got to know what it takes to keep them, and I’ve got to do it.”^{38*}

General Faw’s concern for first-term lawyer retention was well-founded, and his efforts quickly showed results. The pre-Vietnam requirement for 168 lawyers had grown by the war’s end to a wartime requirement of 375 and a peacetime requirement of 273 judge advocates. A peacetime procurement goal was established at 60 lawyers per year.³⁹ The authority for the Judge Advocate Division, with the Personnel Division’s assistance, to assure lawyers of certain assignments was an important tool in keeping lawyer-officers in the Corps and countering civilian recruiting efforts.

Additionally, the return of six majors completing the law school excess leave program in 1971 eased the severe shortage in mid-level supervisory billets.⁴⁰ A valuable source of experienced officers, the excess leave program returned 38 majors to the legal community in 1972, and a high of 54 more in 1973. The goal was for the excess leave program to level out with the annual return of 14 new lawyers with former line experience.⁴¹

The difficulty in retaining first term judge advocates lasted for the entire war. Overlaying the retention issue was the opinion of many senior judge advocates that career-oriented Marine Corps lawyers should have experience as line officers. General Faw said, “I feel very strongly that every Marine lawyer ought to be a line officer [for some period] No lawyer can do his job properly until he knows the problems of a commander.”⁴² Colonel Joseph R. Motelewski, formerly chief of staff, then SJA of the 3d Marine Division, agreed: “If you don’t have some

*General Anderson, however, Marine Corps Director of Personnel at that time, recalls that assignment procedures and policies for judge advocates remained unchanged except in isolated cases. (Gen Anderson ltr to author, dtd 22Feb89, Anderson folder, Marines and Military Law in Vietnam file, MCHC.)

line officer's mark on you . . . you've got a real long row to hoe."⁴³ Colonel Robert B. Neville, former Discipline Branch head and deputy chief of staff of III MAF, added, "I don't think any lawyer can effectively represent his client, unless he can understand the society . . . in which his client lives."⁴⁴

General Faw and Colonels Motelewski and Neville, with their own exceptional backgrounds in infantry and aviation commands, experienced early careers in which lawyers were not only expected to aspire to line experience, but could expect careers to wither without it. By the time the Vietnam War began, Marine Corps policy had expressly freed senior lawyers from the *de facto* requirement to command or forego promotion. As the war progressed, and to a greater degree after the war, legal services assumed an ever more prominent role. That militated against intermittent assignments to line billets, while encouraging expertise and specialization acquired through continuous application of legal skills. Still, the judge advocate's suspicion, that without line experience, he was not a "real" Marine in the line commander's view, died hard. General Paul X. Kelley, former Commandant of the Marine Corps, believed that "the great strength of our judge advocates was the fact that an awful lot of them had served as combat . . . officers, and had actually led troops . . . I was concerned that if the trend [to judge advocates without line experience] continued, we could end up literally with a civilian judiciary in uniform."⁴⁵ Vietnam demonstrated that Marine Corps lawyers, having received the same basic training as every infantry officer, willingly and capably commanded line units, given the opportunity.

*The Uniform Code of Military Justice:
Did It Work in Vietnam?*

In 1949 the House Armed Services Committee Report on the newly enacted Uniform Code of Military Justice (UCMJ) read: "The law which we are now writing will be as applicable and as workable in time of war as in time of peace and . . . we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations."⁴⁶

The Code became law in May 1950, a month before the outbreak of the Korean War. Most courts-martial tried in that conflict were conducted in Japan, not the combat zone. Colonel Robert M. Lucy, former SJA of the 1st Marine Division, noted that "Vietnam posed a peculiar set of disciplinary problems which may not be repeated . . . I was a company

commander in Korea . . . and I don't recall having many disciplinary problems—certainly none of a violent nature which was so common in Vietnam."⁴⁷ The Vietnam War was the first real application and test of the Code under combat conditions, although "combat conditions" was an elastic term when examining the circumstances in which judge advocates worked.

Brigadier General Edwin H. Simmons, assistant division commander of the 1st Marine Division in the final year of the war, wrote of conditions in the late stage of the war:

Neither the 3d nor the 1st Marine Division headquarters ever really operated "in the field" in Vietnam There were air-conditioned work spaces, good billeting, first-class messing, adequate recreational facilities, good clubs Probably a whole generation of Marines thinks that is the way a Division command post in a combat zone should look and operate. (I have heard far more senior officers say that our experience in Vietnam "proves" that . . . the present cumbersome system of military justice will "work" in a combat environment.) We must find ways of keeping the extraneous administrative functions in the rear out of the objective area.⁴⁸

Colonel John R. DeBarr, after having been a general court-martial judge in Vietnam, noted that the judicial process could no longer easily be moved to a secure area like Okinawa or Japan. He pointed out that the trial should be held where the crime was committed, because witnesses and evidence were there, and the commander will want to keep apprised of the administration of military justice, a function of command.⁴⁹

More important than the place of trial is the question of the workability of the system itself. Did the UCMJ work in Vietnam? Clearly, it worked in the sense that thousands of courts-martial were tried.

Many senior judge advocates thought the system had worked quite well. Throughout the war lawyers worked hard and prosecuted thousands of cases through to conviction. But opinion was divided. Brigadier General Faw, Director of the Judge Advocate Division during the war, bluntly stated:

I'm one of the people that thinks that the Uniform Code of Military Justice failed in Vietnam, and it'll be a greater failure in succeeding wars, if we get into one like World War II There were too many people who were guilty of very, very serious crimes who were never brought to trial because of the difficulties of getting witnesses, keeping witnesses [in country], and so forth Justice isn't just unless it also convicts those who are guilty.⁵⁰

Another former Director, Brigadier General Tiernan, agreed:

[The military justice system] was far less than satisfactory, far less than ideal A lot of cases, I know for a fact, were just not prosecuted Resources were so limited [that minor cases] were, necessarily, ignored. We had to concentrate on the more serious crimes What we considered to be a special court-martial misdemeanor, military-type offense was not being prosecuted, simply because of a lack of resources. We couldn't do it, period.⁵¹

A seminal law journal article examining the Code's effectiveness in Vietnam was written by Major General George S. Prugh, former Judge Advocate General of the Army, and General William C. Westmoreland, former commander of MACV and Chief of Staff of the Army. They wrote:

It is our conclusion that the Uniform Code of Military Justice is not capable of performing its intended role in times of military stress It is presently too slow, too cumbersome, too uncertain, indecisive, and lacking in the power to reinforce accomplishment of the military mission, to deter misconduct, or even to rehabilitate.⁵²

Professor Guenter Lewy, in his analysis of the war, wrote: "Many commanders felt that the system of military justice was too permissive and over-zealous in guarding the rights of individuals, and thus was more of an antagonist than an ally of their efforts to control the deterioration of discipline."⁵³ Colonel Arthur R. Petersen, while still an SJA in Vietnam, wrote: "The Code does not work in combat and does not accomplish its only legitimate objective of promoting discipline Changes must be made."⁵⁴

Colonel Donald E. Holben had more practical experience with the Code in Vietnam than any other Marine Corps judge advocate. He said:

The system does not work, from a military viewpoint Under no circumstances will it work in an all-out war, as it is now organized Under the phoney circumstances of Vietnam we were sitting there in barracks, in essence, in Da Nang and Chu Lai and Quang Tri . . . it permitted us to operate the system It did not adequately support command, and accomplishment of its mission. Proceedings are too long and drawn out, too far removed from reality. I think even now [1986], with the new changes, with the defense "command structure," it would be ridiculous to think that the system would work.⁵⁵

Major Curt Olson, the 1st Marine Aircraft Wing's last SJA in Vietnam, agreed that post-war changes to the Code made its future application in combat even more difficult. "I do not think that we could have made it under those conditions with our present rules."⁵⁶ Major Olson was also concerned about defense tactics that affect case disposition:

Defense requests for numerous character witnesses from the U.S.; requests for psychiatric examinations in the U.S.;

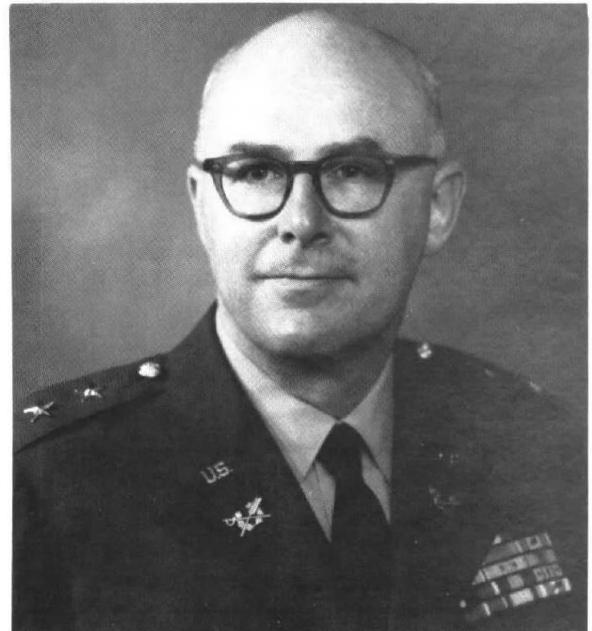


Photo courtesy of MGen George S. Prugh, JAGC, USA, (Ret.)
MajGen George S. Prugh was the Judge Advocate General of the Army from 1971 to 1975. He said: "The Uniform Code of Military Justice is not capable of performing its intended role in times of military stress."

requests for expert witnesses from the U.S.; requests for delay while the accused attempted to obtain civilian counsel in the U.S.; requests for individual military counsel who just happened to be across the world from Vietnam. All of these combined with the witness problems . . . made the trial of a serious or complex case very difficult to get off the ground The system survived in Vietnam not so much because it was a superior system, there were serious flaws, but because . . . a lot of people worked very hard to make it work.⁵⁷

General Tiernan, as well, believed that changes in military law since the Vietnam War had critical impact:

It's totally unworkable in a combat environment. The state of case law has grown ever more complex, and the role of the defense counsel . . . has expanded many times over You could come up with a dozen things the defense counsel can legitimately request in order to assist the defense of his client that were not even considered in 1970 I see no way that the UCMJ could function today, even in a Vietnam-type situation.⁵⁸

What solutions present themselves? Senior lawyers with long Vietnam experience recommend major change in the military justice system. Colonel Holben suggested the system "should be done away with. Not be revised, cosmetically. I mean the whole system should be done away with and a different system imposed."⁵⁹ Colonel Motelewski, SJA of the 3d Marine Division in Vietnam, essentially agreed: "We should get some realists to revise the Uniform Code of Mili-

tary Justice In wartime you've got to operate on a different basis I hesitate to even say it: have two different systems for wartime and peacetime."⁶⁰ According to Brigadier General Tiernan, "We've got to . . . give serious thought to going to another set of rules [in combat]—summary-type procedures that would function, perhaps in a limited jurisdiction."⁶¹

In a law review article predating the Vietnam War, Army Colonel Archibald King suggested: "If it is impossible, impracticable, or undesirable to . . . follow in time of peace a procedure which will work in time of war, then the law should provide in advance for an automatic change on the outbreak of war from the peacetime procedure to that of wartime."⁶² Major General Prugh concurred, saying: "A much more significant overhaul is necessary, and the time to do this is when we are at relative peace and can study and experiment without wartime risks. Furthermore, the study must encompass experienced line commanders, not judges of the U.S. Court of Military Appeals."⁶³ Along the lines suggested by Colonel King, Generals Westmoreland and Prugh, offering a draft amendment to the UCMJ, said: "One possible way of dealing with the inadequacies of the Code in its wartime or military stress operation is to enact a special codal provision which would take effect only in time of war or other military exigency."⁶⁴

Colonel Charles H. Mitchell, Assistant Judge Advocate General of the Navy for Military Law and former Vietnam trial counsel, suggested that "it's probably time to rethink the entire process from the ground up. We have to have something that's a whole lot more summary than we now have in dealing with relatively minor offenses, and maybe even all disciplinary offenses."⁶⁵

Colonel Mitchell also raised a theme that goes to the fears of civilian critics of military justice when he noted, "we're disciplining an Armed Force; not providing the panoply of Constitutional safeguards to individual citizens We need to have a system which balances the realities against what the lawyers perceive to be necessary to due process."⁶⁶ Colonel Neville wrote: "The drive to make military justice identical to that found in civilian life [is] one of the greatest dangers If we cannot educate our people to the *essential* differences, we may as well disband our Armed Forces."⁶⁷ No one would suggest employing the Punishment Battalions of the Nazi *Wehrmacht*, where conviction resulted in dangerous battlefield assignments, but neither should one confuse the ends of military justice and civilian justice.⁶⁸

In 1983 the Judge Advocate General of the Army appointed a Wartime Legislation Team (WALT) of Army lawyers to evaluate the system and recommend wartime improvements.⁶⁹ The WALT report noted that after the UCMJ was first promulgated:

The United States Court of Military Appeals quickly established a new doctrine called "military due process of law," a powerful concept whereby the Court applies legal protections derived from principles applicable in civilian criminal proceedings, but not provided for by the UCMJ.⁷⁰

Court decisions, the report continued, combined with statutory enactments, led to "judicialization" of military discipline. "American society has come to expect a high level of 'due process' to be built into its punitive systems. In military law . . . too many shortcuts in the system will lead to perceptions of unfairness."⁷¹ Nevertheless, the WALT committee urged limiting or suspending the right to representation by counsel of the accused's choice, including civilian counsel, in areas of hostilities.⁷² Generals Westmoreland and Prugh agreed, saying the right to competent counsel "does not require that the counsel be a civilian attorney transported halfway around the world."⁷³

A major concern of the WALT committee was the lack of court-martial jurisdiction over civilian employees who, during wartime, might desert their posts in the combat zone. Civilians, such as technical representatives of civilian defense firms ("tech reps"), and civilian combat service support personnel, provide critical skills needed by military forces. Indeed, civilian employees of the military services constitute virtually the entire logistic personnel base in Europe. Currently, the only penalty a civilian would suffer for deserting his post is monetary loss and a possible breach of contract action, both of which would apply after the fact and far from the combat zone.⁷⁴

In addressing the application of military law to the combat serviceman, the WALT report quoted an Army Judge Advocate General Corps (JAGC) brigadier general who urged, "Revive the use of depositions. In wartime, they will be indispensable."⁷⁵ In their article Generals Westmoreland and Prugh also urged such a step.⁷⁶

An Army JAGC major general urged in the WALT report, "Travel of witnesses to areas of hostilities should be virtually eliminated." Another JAGC major general addressed Article 32 investigations as well as trials, saying, "After the experiences we all went through in Vietnam, I believe it is obvious that in future wartime conditions . . . we must eliminate the requirement

for personal appearance of witnesses before both bodies."⁷⁷ Generals Westmoreland and Prugh suggested the substitution of depositions or videotape for witnesses who were no longer in the combat zone.⁷⁸

The WALT report concluded that "although the current system will work with reasonable efficiency during a short, low intensity conflict, several changes are necessary in order to be confident that the system will operate effectively during a general war."⁷⁹ The WALT report was submitted, but no changes resulted.

Colonel Robert M. Lucy, who left Vietnam and later became legal advisor and legislative assistant to the Joint Chiefs of Staff, suggested that "relatively simple changes could make [the system] much more workable, such as removing the option to refuse trial by a military judge sitting alone, and restricting the requirement to produce certain witnesses from outside the combat zone."⁸⁰

In 1984 the Secretary of Defense appointed a nine-member commission to report to the Armed Services Committees on aspects of the 1983 Military Justice Act, which had already been passed. Two members of the committee were Colonel Mitchell and Captain Edward M. Byrne, JAGC, USN, who joined in a trenchant separate report to the full committee report. Besides noting the wholesale inapplicability of civilian law to the Armed Forces, they proposed a "field court," akin to a nonjudicial punishment hearing, which would be authorized to try petty crimes and all disciplinary offenses and empowered to impose up to six months confinement, but no punitive separation.⁸¹ No changes resulted from the commission's report.

In their article, Generals Westmoreland and Prugh emphasized:

Probably the most worrisome aspect of this situation [is] that nowhere does there seem to be any recognition of the special need for the military justice system to work in times of military stress. Certainly there has been no effort to evaluate how it has worked and might work in the future. The emphasis has all been in the direction of civilianization. The one certainty is that it is not at all likely to do the job of requiring obedience . . . in time of hostilities.⁸²

The final word may be that of Brigadier General Charles A. Cushman, former Assistant Judge Advocate General of the Navy for Military Law. He was asked if the military justice system would work in a future war. His answer strikes a familiar chord with any Marine: "Would it work? Of course it would work. It would work with major flaws and major difficulties and major delays, but . . . you would make it work."⁸³

Summation

The last major operation in Vietnam involving U.S. ground forces, Operation Jefferson Glenn, ended in October 1971. U.S. forces continued to support the South Vietnamese with advisers and air support. On 27 January 1973 cease-fire agreements were signed in Paris. On 29 March the last American troops, other than defense attaché personnel and Marine Corps embassy guards, left South Vietnam. On 30 April 1975 Marine Corps and Air Force helicopters evacuated the last Americans from Saigon. For the United States the Vietnam War was over.

Over 448,000 Marines served in Vietnam. Approximately 400 Marine Corps lawyers served in the combat zone, 13 of them for two tours. No lawyer was killed and only two, Captain William L. Fly and First Lieutenant Michael I. Neil, were wounded, both while serving as infantry officers.

For most Marine Corps lawyers who practiced in Vietnam, particularly those in the Da Nang area after the first year or two of operations, the circumstances of everyday living were not particularly harsh and certainly less onerous than those of the Marine infantryman. But, as for all combat support Marines, the possibility of violent death was a constant. The threat of rocket attack, enemy sappers, misdirected friendly fire, and death or wounding while in the field with a trial team, forever separated the Marine Corps lawyer from those who had not undergone their experience. As British novelist John LeCarre wrote, "Nothing ever bridged the gulf between the man who went and the man who stayed behind."⁸⁴