PRETRIAL RESTRAINT IN THE MILITARY

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

An analysis of pretrial restraint in the military. This study includes the effects of pretrial restraint in the military setting; the evolution of the concept of release prior to trial in both the civilian and military communities; constitutional problems inherent in the military system as it now exists; as well as a discussion of the applicability of civilian pretrial release concepts to the military.

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CHAPTER I

INTRODUCTION

Restraint prior to trial in the military is basically a matter for command discretion.[1] The Uniform Code of Military Justice and the Manual for Courts-Martial, 1969 establish no comprehensive guidelines regarding the placement of personnel subject to military law in pre-trial confinement. Rather, commanders are merely urged to exercise discretion in determining whether pretrial confinement is warranted in each case. In some instances, commanders are required to obtain the approval of the staff judge advocate prior to confining persons or are furnished in regulatory form local guidelines which are to be employed in determining the necessity of pretrial confinement.

The purpose of this study is to examine the real and possible effects of pretrial restraint, the history of restraint prior to trial in both the civilian and

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[1] See United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

military setting, to discuss some of the more recent innovations which have found their way into the civilian forum, and to determine whether these innovations may be applied to the military. To assist the reader in understanding the ideas expressed herein, the following precepts of the author are declared:

(1) Unwarranted pretrial confinement is detrimental to the interests of both the government and the accused.

(2) Means other than pretrial confinement may be employed to deter flight prior to trial.

(3) Objective evaluation, rather than plenary discretion, should be employed in determining the appropriateness of pretrial restraint.

These precepts are espoused with full realization that the paramount mission of the Army is not rehabilitation of offenders, but the maintenance of the ability to effectively wage war. It is further assumed that justice and fairness have an effect upon morale and discipline in a command, but of far greater effect is the motivation inspired by the commander.

As its title indicates, this paper is principally concerned with restraint prior to trial. It will be sufficient to note that the military services now have a

provision for post-trial release involving deferment of the confinement portion of a sentence by the convening authority. The defering of a sentence to confinement is discretionary and is not a right which the accused may enforce.[2] More than any other factor, it was probably the decision in the case of Levy v. Resor[3] which sparked Congress to modify Article 57 of the Uniform Code of Military Justice thereby applying bail principles to the period subsequent to conviction.

It is the area of pre-trial confinement which is presently controlled by vague and equivocal generalities and which, in the military, is justified by a mere allegation of wrong doing, rather than a conviction, which is subject to abuse. Prior to trial no judicial tribunal

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[2]Military Justice Act of 1968, PL No. 90-632 (Oct. 24, 1968).

"(d) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned."

[3]17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

has passed upon the guilt or innocence of the accused. He may be confined for months notwithstanding the fact that he is presumed innocent; the time he spends in pretrial confinement is not credited to the sentence he receives. Of paramount importance however is the fact that pretrial confinement, in and of itself, may affect the accused's ability to properly defend himself at trial.

CHAPTER II

EFFECTS OF PRETRIAL RESTRAINT

A. Manpower. During calendar year 1967 the Army tried 2,225 persons by general court-martial. The total elapsed time from charges or confinement to trial was 62.2 days.[4] Assuming that 7 out of 10 persons tried by general court were confined prior to trial, the Army lost the services of the combat forces of an infantry battalion for a period of six months as a result of general court-martial pretrial confinement.

B. Economic. The costs of detaining an accused have been estimated at between $5.[5] and $7.[6] a day. At $5. a day, confinement before trial costs the government nearly a half-million dollars each year. Each soldier confined prior to trial is entitled to his full pay and

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[4]Report of General Court-Martial Data, J.A.G.V.U. (RC & AB) 1967.

[5]Hearings on S. 1357, S. 646, S. 647, and S. 648 Before a Subcomm. on Const. Rights and the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary, 89th Cong., 1st Sess., page 197.

[6]Hearings on S. 1357, supra note 5, at 264.

allowances.[7] Assuming that each soldier is paid $150. a month, the government pays another half-million dollars for services which it does not receive.

C. Appellate. Although pretrial release would not obviate the problem of speedy trial in the military, it would certainly help in doing so.[8] The problem is compounded because there are no rehearings on cases reversed for failure to afford an accused a speedy trial. The result is inevitably a dismissal of charges[9] which results in a waste of time and money expended to try the case and take it through the appellate channels.

D. Subtle Effects. The subtle effects of pretrial confinement are incapable of strict proof. They involve questions of human reaction. Statistics, although furnishing some authority for the propositions involved, would not establish a causal relationship

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[7]Department of Defense Military Pay and Allowances Entitlements Manual, Section 10316 a.

[8]See generally United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959). ("[T]he period of confinement before trial must be considered in determining whether the case proceeds to trial with reasonable dispatch.") United States v. Callahan, 10 U.S.C.M.A. 156, 27 C.M.R. 230 (1959). (Under Article 10, U.C.M.J., if the accused is confined, immediate steps must be taken to inform him of the specific wrong of which he is accused and to try him.)

[9]See, e.g., United States v. Lipovsky, 17 U.S.C.M.A. 510, 38 C.M.R. 308 (1968).

between the confinement and the proposed effect thereof.

1. Pleas and Pretrial Investigation. Does lengthy confinement prior to trial have an effect on an accused's plea in court? Does the fact that he gets no credit for his pretrial confinement[10] make him more amenable to forego a possible defense because of the time it would take to perfect it? Is he more prone to prevail upon his counsel to expedite the pretrial investigation so that he can begin serving his sentence? Does the confinement atmosphere, in and of itself, contribute toward a breakdown of an accused's will to contest the charges against him?[11]

2. Appearance of the Accused. An accused tried before a court-martial is entitled to wear his decorations and to be presented as favorably as possible to the court members.[12] Not uncommonly, accused persons confined prior to trial are not arrayed with the medals and decorations to which they are entitled. Dress

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[10] 10 U.S.C. § 857(b)(1964).

[11] See generally Hearings on S. 1357, supra note 5, at 175; Everett, Military Justice in the Armed Forces of the United States 119, 1956; Goldfarb, Ranson: A Critique of the American Bail System 40, 1965.

[12] United States v. Scoles, 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963); United States v. West, 12 U.S.C.M.A. 670, 31 C.M.R. 256 (1962).

uniforms may look less than acceptable because they have been inaccessible to the accused. One authority has noted that: "The appearance and demeanor of a man who has spent days or weeks in jail reflects his recent idleness, isolation, and exposure to the jailhouse crowd."[13]

3. The Effective Assistance of Counsel. To what extent an accused in pretrial confinement is denied the effective assistance of counsel can only be a matter of supposition. It would seem to be true beyond cavil that the most effective assistance can be rendered when the accused and his counsel are free to talk over the case and exchange views whenever the need arises. The fact that an accused is incarcerated many miles from the point where his counsel is located would seem to derogate from this effectiveness. Additionally, there are instances when an accused can be a valuable instrumentality in the pretrial discovery process and can assist in the questioning of a witness prior to trial.[14]

4. Other Effects. To what extent court members are influenced by the presence of armed guards in

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[13]Hearings on S. 1357, supra note 5, at 85-86.

[14]"[A]n accused held in pretrial confinement is severely handicapped in preparing his defense." Id. at 2.

or out of the court room is incapable of proof.[15] Similarly, the effect upon an accused confined prior to trial of the forced association with convicted persons is a matter for speculation.[16] Assuming that an accused is innocent of any wrongdoing [and we presume as much], will the experience of spending two or more months in jail tend to improve his attitude toward the Army or society in general? Is it the type of experience which will better enable him to become a good citizen upon his release from active duty?

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[15] Cf. United States v. West, 12 U.S.C.M.A. 670, 674, 31 C.M.R. 256, 260 (1962).

[16] "Presumably, innocent persons can hardly be expected to remain impervious confined with convicted criminals. This could have a particularly significant and damaging impact upon young persons, and might easily reinforce--rather than diminish--any disposition they have for criminal activity." Hearings on S. 1357, supra note 5, at 12.

CHAPTER III

EVOLUTION OF THE CONCEPT OF PRETRIAL RELEASE

A. Civil Law

1. England

During the 12th Century, it was uncommon in England to imprison an accused before trial. Imprisonment was costly and an added responsibility for the sheriff who was content to discharge himself from this responsibility by releasing accused persons to the custody of their friends. It is thought, however, that had the prisons been more secure perhaps the pretrial release of accused persons would have been curtailed.[17] Additionally, during this period arrest meant imprisonment without benefit of a preliminary hearing. Serious cases were tried by the justices whose arrival might be delayed for years. It was thus imperative that some form of pretrial release be effected.[18] At one time, even those charged

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[17] 2 Pollock & Maitland, History of the English Law 584 (2d ed. 1909).

[18] 1 Stephen, History of the Criminal Law of England 534 (1883).

with homicide or treason were releasable,[19] but those imprisoned by the special command of the King or his Chief Justiciar were not.[20]

Before 1275 the discretionary powers of the sheriff regarding release and detention of prisoners before trial were ill-defined and led to abuses which were dealt with by the Statute of Westminister.I.[21] The statute chastised the sheriff for releasing persons who should not have been released and for detaining persons who should have been released. Furthermore, it defined for the first time which persons were eligible for release. The criteria for release were generally the character of the offense and the certainty of conviction.[22] In order to assure the accused's appearance, a surety had to assume personal responsibility for him. Since the failure of the accused to appear could result in forfeiture of the surety's property, local landowners were preferred as sureties.[23]

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[19]2 Pollock & Maitland, supra note 17, at 584.

[20]Id. at 585.

[21]3 Edw. I, c. 12, AD 1275.

[22]1 Stephen, supra note 18, at 235.

[23]2 Pollock & Maitland, supra note 17, at 590.

By 1444 the major powers exercised by the sheriff involving release before trial had been effectively transferred to the justices of the peace.[24] This was a natural step for it was at the preliminary hearing, which had evolved in the interim period and was presided over by the justice, where the accused was first exposed to the judicial machinery of the state.

During the 17th Century it was not uncommon for the crown to arbitrarily imprison political opponents. This practice led to the passage of the Habeas Corpus Act of 1679.[25] James II resented the act and though unsuccessful in his attempts to have it repealed, he was able to prevail upon his justices to set bail in unreasonably high amounts thus avoiding the requirements of the act. This practice of setting high bail led to the provision in the English Bill of Rights of 1689[26] proscribing the requirement of excessive bail.[27] This

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[24] 1 Stephen, supra note 18, at 236.

[25] Perry & Cooper, Sources of Our Liberties 193 (1959).

[26] "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 1 W&M., 2d Sess., ch. 2, preamble, para. 10.

[27] Perry & Cooper, supra note 25, at 194.

prohibition was incorporated into many colonial constitutions[28] and the Northwest Ordinance[29] before finding its way into the Constitution of the United States.[30]

2. American Colonial Implementation

Before the Eighth Amendment to the United States Constitution was adopted on 15 December 1791,[31] similar provisions had been incorporated into the constitutions of many of the colonies. The first colony to include a provision for bail was Massachusetts which did so in 1641,[32] 48 years before the promulgation of the English Bill of Rights. That state provided for presentence release contingent upon the giving by the accused of sufficient security, bail, or mainprise to assure his presence and good behavior. Exempted from the section were

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[28] Id. at 235.

[29] "All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great." Art. II, Northwest Ordinance, Jul. 13, 1787, Chas. G. Tansill (ed), Documents Illustrative of the Union of the United States, 69th Cong., 1st Sess., 1927, House Doc. 47-54.

[30] "Excessive bail shall not be required. . . ." U.S. Const., amend VIII.

[31] Perry & Cooper, supra note 25, at 246.

[32] Mass. Body of Liberties, Sec. 18, Dec. 10, 1641, Wm. H. Whitmore (ed), The Colonial Laws of Massachusetts, 1672 (Boston, 1890), 5.

capital crimes, contempts, and cases where an express act of court allowed confinement. William Penn included a provision guaranteeing bail in his first Frame of Government of Pennsylvania in 1682.[33] Excepted were capital crimes "where the proof is evident or the presumption great." Virginia[34] and Delaware[35] incorporated the exact language of the English Bill of Rights into their constitutions. The Maryland proviso was similar to Virginia's but prohibited the setting of excessive bail "by the courts of law."[36] Vermont[37] and New Hampshire[38]

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[33]Laws Agreed Upon in England, Frame of Government of Pennsylvania, Sec. XI, Apr. 25, 1682.

[34]Const. of Virg., Sec. 9, Jun. 12, 1776, Francis N. Thorpe (ed), The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, (Washington, 1909).

[35]Delaware Declaration of Rights, Sec. 17, Sep. 11, 1776, Laws of the State of Delaware, 1700-1797 (New Castle, 1797), I, Appendix, 79-81.

[36]Const. of Maryland, Sec. XXII, Nov. 3, 1776, Francis N. Thorpe (ed), The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, (Washington, 1909).

[37]Const. of Vermont, Sec. XXVI, Jul. 8, 1777, Francis N. Thorpe (ed), The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, (Washington, 1909).

[38]Const. of New Hampshire, Sec. XXXIII, Jun. 2, 1784, Francis N. Thorpe (ed), The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, (Washington, 1909).

proscribed excessive bail in their constitutions. The constitution of North Carolina contained language identical to that later incorporated into the Eighth Amendment to the United States Constitution.[39]

The Northwest Ordinance of 1787 was important because it guaranteed to settlers the same rights they had as inhabitants of the United States. In addition to constituting the first bill of rights enacted by the federal government,[40] it set out what on its face was a more liberal interpretation of bail than is contained in the Eighth Amendment: "All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great."

3. The Eighth Amendment to the United States Constitution

The Judiciary Act which became law on 24 September 1789, provided that bail was to be granted in all criminal cases, except those in which the punishment may be death.[41] The Eighth Amendment guarantee prohibiting

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[39]Const. of North Carolina, Sec. X, Dec. 14, 1776, Francis N. Thorpe (ed), The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, (Washington, 1909).

[40]Perry & Cooper, supra note 25, at 387.

[41]"And upon all arrests in criminal cases, bail

excessive bail was approved by a joint Senate-House Committee on 25 September 1789, the day following the passage of the Judiciary Act. Although the Eighth Amendment and the Judiciary Act have coexisted for over 175 years, such coexistence, as will be explained later, has not always been peaceful.[42]

The difference in terminology between the Judiciary Act and the Eighth Amendment is important because under the former bail was to be admitted upon all arrests in criminal cases, except those capital; under the latter it is merely the setting of excessive bail which is prohibited. The argument may be made that a federal magistrate who does not allow bail at all is not violating the amendment, however, one who allows bail but sets it "excessively" high is violating it.

4. The Federal Rules of Criminal Procedure

These rules make bail mandatory only before the conviction and when the offense charged is not capital.[43]

5. Judicial Interpretations

a. Nature of the Right

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shall be admitted, except where the punishment may be death. . ." An Act to Establish the Judicial Courts of the United States, 1789, Stat. I, Sep. 24, 1789, Sec. 33.

[42]Perry & Cooper, supra note 25, at 425.

[43]Fed. R. Crim. P. 46(a)(1).

Whether the Eighth Amendment guarantees the right to bail in non-capital criminal cases or merely guarantees that if granted bail will not be excessive has long been the subject of argument.[44] The short answer appears to be that the type of non-capital case may be a prime factor in making this determination. The strongest language indicating that the right to bail exists independent of the question of excessiveness is contained in Stack v. Boyle.[45] In that case Chief Justice Vinson said:

> From the passage of the Judiciary Act of 1789, 1 Stat. 73,91 to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail, [emphasis original][46]

Judge Holtzhoff has opined that the Eighth Amendment guarantees the right to bail by necessary implication in cases not capital.[47] An emminent scholar has

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[44]See, e.g., Hudson v. Parker, 156 U.S. 277; see also Hearings on S. 1357, supra note 5, at 174.

[45]342 U.S. 1 (1951).

[46]342 U.S. 1, 4 (1951).

[47]"The right to bail before trial, except in capital cases, is guaranteed by the Bill of Rights. The Eighth Amendment to the Constitution of the United States, which is part of the Bill of Rights, provides that 'excessive bail shall not be required'. This clause has

concluded that the excessive bail provision of the amendment "was meant to provide a constitutional right to bail and that the inadequacy of the form adopted for this purpose was the result of inadvertance."[48]

b. Conditional Factors Relating to Release Before Trial

Two conditions relating to release prior to trial are immediately apparent. First, the right to bail is not absolute in a capital case[49] and second, before 1966 release was generally contingent upon the pledging of something of value.[50]

Additionally, release has been denied in the public interest.[51] Under federal law,[52] belief in the accused's mental incompetancy is a ground for his committment

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invariably been construed as guaranteeing the right to bail by necessary implication and not merely meaning that when allowed bail shall not be excessive." Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1960).

[48]Foote, The Coming Constitutional Crisis in Bail: I, 113 U. Pa. L. Rev. 959, 987 (1965).

[49]Fed. R. Crim. P. 46(a)(1); Stack v. Boyle, 342 U.S. 1 (1951).

[50]See, e.g., Pilkinton v. Circuit Court of Howell County Missouri, 324 F.2d 45 (8th Cir. 1963).

[51]Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice 1962).

[52]18 U.S.C. § 4244 (1964).

notwithstanding the right to bail. This procedure has been reviewed and approved by the United States Supreme Court which found the committment to "involve an assertion of authority, [on the part of the state] duly guarded, auxilliary to incontestable national power."[53]

In Carbo v. United States[54] Justice Douglas, as Circuit Justice for the Ninth Circuit, was called upon to review an order denying bail. The defendant had been convicted of the Anti-Racketeering Act, extortion, and conspiracy. In denying bail the justice relied upon the defendant's alleged leadership of the conspiracy, a criminal record extending back nearly forty years, a conviction for first degree manslaughter and a twenty year old trial for murder which ended in a hung jury. The murder case was not retried because of the death of one prosecution witness and the disappearance of another. The bail hearing contained considerable evidence of threats made to the government's principal witness. Restating the proposition that the denial of bail should not be used to sentence an accused for an unproved crime, Justice Douglas went on to state:

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[53]Greenwood v. United States, 350 U.S. 366, 375 (1956).

[54]82 S. Ct. 662 (Douglas, Circuit Justice, 1962).

> Yet what Judge Boldt said at the hearing on bail pending review bothers me greatly. He concluded that there was a strong likelihood that witnesses in this case will be further molested and threatened and perhaps actually harmed. In my view the safety of the witnesses, should a new trial be ordered, has relevancy to the bail issue. Keeping a defendant in custody during the trial to render fruitless any attempt to interfere with the witnesses or jurors may, in the extreme or unusual case, justify denial of bail.[55] [emphasis added]

The proposition espoused by Justice Douglas is termed preventive detention, i.e., detention to prevent further misconduct on the part of the accused. Although bail has been set at a high level in order to effect detention,[56] the better view is that the setting of excessive bail or its outright denial is prohibited unless danger to the public interest is imminent. In the words of Justice Jackson:

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[55] Id. at 668-669; see Rehman v. Calif., 85 S. Ct. 8 (Douglas, Circuit Justice, 1964), wherein bail of $500,000. was challenged as excessive upon conviction of certain non-capital offenses. After a hearing the judge who originally set the bail revoked it and remanded the defendant to custody stating "to permit Dr. Rehman to remain on bail pending appeal constitutes an immediate, clear and present danger imperiling, jeopardizing, and threatening the health, safety, and welfare of the community." Justice Douglas denied bail notwithstanding the fact that he could not term the appeal frivolous. Cf., United States v. Rice, 192 F. 720 (2d Cir. 1911) where the defendant was jailed during his trial to prevent him from tampering with or intimidating the jury.

[56] E.g., Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964).

> Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it . . .[57]

c. Nature of the Proceedings

Although there is authority to the contrary,[58] the fact that proceedings are not designated as criminal in nature does not preclude the right to bail.[59] Aliens facing deportation have no express constitutional right to bail pending a hearing;[60] however, an administrative decision to retain custody over the alien must be reasonable.[61]

d. When is Bail Excessive?

The purpose of bail is to provide additional assurance that an accused will be present at his trial and submit to the jurisdiction of the court. "Bail set at a

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[57]Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950). (In this case government attorneys feared that the defendants would make speeches and write articles for the Communist Daily Worker.)

[58]State ex. rel. Peaks v. Allaman, 51 Ohio Ops. 321, 115 N.E.2d 849 (1953).

[59]Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960).

[60]Carlson v. Landon, 342 U.S. 524 (1952).

[61]United States ex. rel. Belfrage v. Shaughnessy, 212 F.2d 128 (2d Cir. 1954). (Refusal to answer questions proposed by Congressional committees regarding communist affiliations was not a reasonable basis upon which to deny bail.)

figure higher than an amount reasonably calculated to fulfill this purpose is excessive."[62] The fact that the defendant is impecunious or is unable to post bail in the amount set does not automatically indicate excessiveness.[63]

The case of Bandy v. United States,[64] which may have played a part in the liberalized approach to bail effected during the early 1960's, questioned the requirement of bail for indigents as a possible violation of due process and equal protection of the laws:

> The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release.
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> But this theory is based upon the assumption that the defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. . . . Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on "personal recognizance" where other relevant factors make it reasonable to believe that he will

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[62] Stack v. Boyle, 342 U.S. 1, 3 (1951).

[63] Hodgdon v. United States, 365 F.2d 679 (8th Cir. 1966); White v. United States, 330 F.2d 811 (8th Cir. 1964).

[64] 82 S. Ct. 11 (Douglas, Circuit Justice, 1961).

comply with the orders of the Court.[65]

6. The Reform Movement

a. The Problems

The systems of bail in both England and the United States evolved to achieve the same result: to insure the presence of the defendant at his trial without undue deprivation of his freedom. However, the means of effecting the system had always been different in America than in England. While the English relied, and still do, on the private surety or the friend of the defendant who would guarantee the latter's presence as a matter of accommodation, the professional bondsman fulfilled this function in the United States.

> In America . . . emphasis on the individual's absolute right to bail led to practical difficulties in a large country whose frontier territories beckoned invitingly to those with a dim view of their chances of acquittal. The initial judicial reaction was to remind the party furnishing bail that he was a quasi-judicial officer with powers of a jailer, and that he was responsible for procuring the accused's attendance at trial. But since private sureties could not effectively conduct nationwide searches for their itinerant charges, their promise to produce the accused gradually became a promise merely to pay money should the accused fail to appear. This development ushered in the professional bondsman who saw an opportunity for financial gain. In return for the payment of a fee, the bondsman would post a bond on behalf of the accused.[66]

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[65] Id. at 11.

[66] 70 Yale L. J. 966 (1961).

It is therefore apparent that one without money or property will fare badly under the American system in the event he is required to post bond. Mr. Jack T. Conway, Deputy Director of The Office of Economic Opportunity, told the Senate Subcommittee conducting hearings on remedial legislation about some of the problems inherent in the then existing system:

> Thirty-five million "hard core" poor, one-fifth of our nation, live on family incomes of less than $60. a week. The minimum bail is usually set at $500. requiring a $50. or $75. premium for securing bond from a professional bondsman; bail of $2500. or $5000. is not infrequent. Consequently, the poor generally cannot make bail. . . . [and] prior detention hobbles adequate preparation for trial. When a person of very small means can post bond, this is usually done by borrowing at exhorbitant interest rates and cutting deeply into an already marginal standard of living. When he cannot post bond, the accused generally loses his job. . . . Loss of personal income results in a loss of spending power and tax revenue.[67]

Pretrial restraint of persons charged with Federal crimes has cost the government over $2,000,000. yearly.[68] Apart from economic considerations "the accused who is unable to post bond, and consequently is held in pretrial confinement, is severly handicapped in preparing his defense;"[69] young persons especially are adversely affected

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[67] Hearings on S. 1357, supra note 5, at 85.

[68] Id. at 2.

[69] Id.

by the prison atmosphere;[70] and the appearance and demeanor of the prisoner readily indicate his status before trial.[71]

b. The Vera Foundation (Now the Vera Institute of Justice)

Any inquiry into the reform of bail procedures must begin with the Vera Foundation's Manhattan Bail Project. This project was based upon the premise that judges would release defendants on their own recognizance if they were furnished verified information about them tending to indicate that the defendant was a good risk.

Release on recognizance was no innovation.[72] However, it was not used to a great extent because generally insufficient background information about a defendant was available to make a risk evaluation based upon relevant factors. The Manhattan Bail Project furnished this information. Mrs. Marion Katzive of the Vera Foundation explained to a House Subcommittee how the system works:

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[70] Id. at 12.

[71] Id. at 85-86.

[72] "[I]n proper cases no security need be required." Fed. R. Crim. P. 46(d).

When a prisoner is brought to the detention pen prior to his first court appearance, a law student checks his previous record and current charge with the arresting officer to see if he is bailable in the criminal court. Under the original project the law student determined whether the defendant had been charged with homicide, a narcotics offense, or a sex crime. In the beginning these were excluded from the experiment because of the special problems they seemed to present. As the project is now run by the office of probation only the homicide charge warrants immediate exclusion. Time and staff permitting, defendants charged with all other crimes will be interviewed. The interview is geared to determine whether the defendant has roots in the community. He is asked whether he is working, how long he has held his job, whether he supports his family, whether he has contact with relatives in the city, whether he receives unemployment insurance or welfare relief, etc.

After the interview the defendant is scored according to a point-weighted system. If the interview indicates that the accused would be a good risk for release on recognizance the interviewer obtains written permission from the prisoner to get in touch with a friend, relative, or employer for the purpose of verifying the information. Verification is done either by telephone or in the visitor's section of the courtroom. An interview generally takes about 10 minutes and verification less than an hour.

If the case is still considered a good risk after verification, a summary of the information is sent to the arraignment court. Copies of the recommendation and supporting information are given to the judge, the district attorney, and counsel for the accused.

Now let me translate the system into a typical case history.

Walter Layne is charged with felonious assault. His prior criminal record consists of a felonious assault charge which was reduced to simple assault, for which he received 30 days suspended sentence in 1952. In 1957 he was convicted of driving while intoxicated and his sentence was $100 fine or 30 days. He couldn't post the fine, and went to jail. In 1961 he was convicted on a disorderly conduct charge, and got a suspended sentence.

He is 35 years old, has been living at his present residence for 6 months with his wife and child and had a verified previous 1-year residence in Manhattan. He has been working as a counterman in a restaurant for the past 3 months, and his previous job has been verified as lasting 3 years. His current employer says he is a good worker. If released on recognizance, the employer volunteers to help him get to court.

Should Mr. Layne be recommended for release on recognizance? Well, this is how we calculate his score: -1 point for three misdemeanor convictions, +2 points for a stable residence, +2 points for family ties, +2 points for good ratings on present and prior jobs. Mr. Layne receives a total of 5 points.

Although this is a minimum score, he is recommended for release on recognizance.[73]

During the three year period preceeding August 1964, 3505 accused persons were released upon the recommendation of the Vera Staff. Of these 98.4% appeared for trial; the remainder willfully failed to appear. Initially the staff was recommending release only for misdemeanors, but later during the period they broadened the releasable offenses to include all but homicide and certain narcotics offenses.[74]

c. The Department of Justice

In March, 1963 the Department of Justice urged

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[73]Hearings on H.R. 3576, H.R. 3577, H.R. 3578, H.R. 5923, H.R. 6271, H.R. 6934, H.R. 10195, and S. 1357 Before Subcomm. No. 5 of the Comm. on the Judiciary, 89th Cong., 2d Sess., page 86-87.

[74]Hearings on S. 1357, supra note 5, at 51.

all United States Attorneys to take the initiative in recommending release on recognizance when they were satisfied that there was no substantial risk of non-appearance. Before the inception of the program, this type of release was practiced in 6% of the cases; by March 1964 the percentage had climbed to 17.4%; and by March of 1965 release on recognizance was practiced in 39% of the cases tried.[75]

The then Deputy Attorney General, Ramsey Clark, reported to the Senate Subcommittee that in the Eastern District of Michigan, which had practiced release on recognizance for the longest period of time, 84% of the defendants were released during the period March 1964-March 1965. Only 1 defendant out of 711 defaulted on his promise to appear. In the district of Connecticut the default rate was 1 out of 99.[76]

d. Other Projects

As of 15 June 1965 it was estimated that 33 states were involved in some type of bail reform movement.[77] The "Illinois Plan" was devised in order to "regain from professional bondsmen the control of bail

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[75] Id. at 21.

[76] Id. at 23.

[77] Id. at 40.

releases and to restore such control to the courts . . . "[78] To do this the state adopted the "ten percent provision." For all bailable offenses, the accused could obtain his release by executing a bond in the amount of the bail set and depositing 10% of the amount with the Clerk of Court. Compliance with all the conditions of his bond would entitle the defendant to a refund of 90% of his cash deposit.[79] Although the program is said to be operating satisfactorily,[80] there is some disagreement.[81]

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[78] Id. at 190.

[79] To meet a bond set at $1000. the defendant executes a bond for $1000. and deposits $100. (10% of the face amount of the bond) with the Clerk of Court. After satisfying the conditions of the bond, $90. (90% of the deposit) is refunded. The cost of the defendant's freedom is $10. Were a professional bondsman to have furnished the bond, the cost would have been $100. (10% of the bond). Id. at 190-191.

[80] See generally, Hearings on S. 1357, supra note 5, at 189-193.

[81] Chicago American, Oct. 12, 1964 "State Takes Beating from Bail Jumpers."

"Just over 500 persons exercised the 10-percent option through September 15 of this year.

Under the 10-percent provision 46 bonds totaling $126,000 have been ordered forfeited. In 30 cases, 65.2 percent the defendants have not been located, and only $8,000 of their total of $80,000 in bonds was posted with court clerks.

Illinois notifies all its law enforcement agencies and other States of wanted fugitives, but many bondsmen offer the added inducement of rewards for information leading to an arrest, and they will pay the cost of having the persons returned if necessary."

The District of Columbia Bail Project was modeled after the Manhattan Project,[82] that is, project personnel recommended release of accused persons on their own recognizance where strong community ties indicated they would appear for trial as promised. "Once the court released a recommended defendant, a staff member advised the releasee to stay out of trouble, and warned him of the penalties for failure to appear."[83] Accused persons who had previously been convicted of certain felonies, violations of probation or parole, escape from a penal or mental institution, or bail jumping, were not interviewed.[84] During the period January 1964 to July 1966, 19% of all persons charged with offenses were interviewed; 49% of the interviewees were recommended for release and of those recommended, the courts released 85%. The default rate during this period was 3%.[85]

Under the Tulsa Plan a defendant may be released to the custody of his attorney prior to trial in certain cases. A list is maintained of all attorneys desiring

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[82]Molleur, Bail Reform in the Nation's Capital 22-23, 1966.

[83]Id. at 24.

[84]Id. at 25.

[85]Id. at 31.

to participate in the program. To have his name retained on the list, the attorney must fulfill the terms of an agreement entered into with the court. The agreement generally provides that the attorney will be responsible for his client's appearance and that he will not knowingly request the release of a previously convicted felon. In the 2 year period following the inception of this program in 1963, nearly half of the members of the Tulsa County Bar were participating in the program and over 2500 defendants had availed themselves of the release provisions.[86]

7. The Federal Bail Reform Act of 1966[87]

a. General

The Bail Reform Act furnishes courts and magistrates with specific criteria for release of persons charged with non-capital offenses prior to trial, release of persons charged with capital offenses or after

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[86] See generally, Goldfarb, Ranson, A Critique of the American Bail System 203-212, 1965.

[87] 18 U.S.C. § 3141-3152 (1965-67 Supp.). (Section 2 states that the purpose of the act "is to revise the practices relating to bail to assure that all persons, regardless of their financial status shall not be needlessly detained pending their appearance to answer charges, to testify, or pending appeal, where detention serves neither the ends of justice nor the public interest.")

conviction, and for determining the processing of appeals from the conditions of release. In defining the word "offenses" the act excludes offenses triable by courts-martial.[88]

b. Release in Non-capital Cases Prior to Trial[89]

The statute provides that a defendant be released on his own recognizance or upon execution of an unsecured bond unless the judicial officer determines that such release will not assure the appearance of the defendant. If the judicial officer determines that release on recognizance or release on an unsecured bond will not assure the defendant's appearance, he may either substitute, add, or combine the first of the following conditions which will assure his presence.

(1) place the accused in the custody of another,

(2) place restrictions upon the accused's travel, associations, or place of abode,

(3) require the accused to execute a bond secured by a sum not to exceed 10% of the face value thereof, which will be returned upon performance of the conditions of release,

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[88] 18 U.S.C. § 3152(2)(1965-67 Supp.).

[89] 18 U.S.C. § 3146(a)(1965-67 Supp.).

(4) require a bail bond with sufficient sureties, and/or

(5) impose any condition reasonably necessary to assure appearance, including a return of the accused to custody after specified hours.

In making a determination as to which condition or conditions will assure the defendant's presence, the judicial officer is to consider, in addition to the traditional factors,[90] the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at prior court proceedings.[91] The judicial officer is required to inform the accused of the conditions imposed and the penalties for violations thereof.[92]

An accused who, after 24 hours from the hearing, is unable to meet the conditions of release set by the judicial officer or who is released on condition that he return to custody after specified hours is entitled, upon application, to have the conditions reviewed by the

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[90] 18 U.S.C. § 3146(b)(1965-67 Supp.)(the nature and circumstances of the offense charged and the weight of the evidence against the accused).

[91] Id.

[92] 18 U.S.C. § 3146(c)(1965-67 Supp.).

judicial officer who imposed them. The judicial officer may either amend the conditions and release the accused, or set forth the reasons, in writing, for requiring the conditions.[93]

c. Release in Capital Cases or After Conviction

Defendants charged with capital offenses or who have been convicted shall be released "unless the court or judge has reason to believe that no one or more of the conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community . . . or if it appears that the appeal is frivolous or taken for delay . . ."[94] There is no appeal under the terms of the act itself from detention under this section, however other rights to judicial review are not affected.[95]

d. Appeal from Conditions of Release in Non-Capital Cases Before Trial

A defendant who is detained or who is released on condition that he return to custody after specified hours may, after seeking review by the judicial officer

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[93] 18 U.S.C. § 3146(d)(1965-67 Supp.).

[94] 18 U.S.C. § 3148 (1965-67 Supp.).

[95] Id., e.g., habeas corpus or mandamus.

who imposed the conditions, move that the order be amended by the court having original jurisdiction over the case. This is so unless those conditions were imposed by the judge of the court of original jurisdiction, a judge of a United States Court of Appeals, or a Justice of the United States Supreme Court.[96] Appeals may be taken to courts having appellate jurisdiction over the courts imposing or refusing to modify the conditions of release. Orders which are supported by the proceedings below are to be affirmed; in those cases in which the orders are not supported, the appellate tribunal may remand for further hearing or order the defendant released.[97]

B. Military Law

1. The Articles of War

The first American Articles of War were enacted on 30 June 1775 and, as they related to confinement prior to trial, were a duplication of the British Articles of War of 1765.[98] Upon the commission of an offense an officer was to be placed in arrest; a non-commissioned officer or a soldier was to be imprisoned until tried by

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[96]18 U.S.C. § 3147(a)(1965-67 Supp.).

[97]18 U.S.C. § 3147(b)(1965-67 Supp.).

[98]British Articles of War of 1765, Sec. XV, Arts. XVII-XXII, Winthrop, Military Law and Precedents, 2d Ed., 1920 Reprint, page 931, 944-945.

court-martial or discharged from confinement by proper authority.[99] No officer or soldier placed in arrest or confinement was to remain in that state for more than 8 days or until a court-martial could be "conveniently" assembled.[100] Persons to whose charge a prisoner was committed were required to notify the prisoner's unit within 24 hours of committment or when relieved from guard.[101] If an officer broke arrest before properly being set at liberty, he was to be dismissed.[102] In the Articles of War of 1786 officers and enlisted men were treated in separate articles for purposes of determining what form of restraint was to be employed.[103] In addition the word "conveniently" was omitted so that arrest or confinement was to continue for no more than 8 days or until a court-martial could be assembled.[104] The word

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[99]American Articles of War of 1775, Art. XLI, Winthrop, supra note 98, at 956.

[100]American Articles of War of 1775, Art. XLII, Winthrop, supra note 98, at 956.

[101]American Articles of War of 1775, Art. XLV, Winthrop, supra note 98, at 957.

[102]American Articles of War of 1775, Art. XLVI, Winthrop, supra note 98, at 957.

[103]American Articles, Enacted May 31, 1786, Arts. 14 & 15, Winthrop, supra note 98, at 972, 973.

[104]American Articles, Enacted May 31, 1786, Art. 16, Winthrop, supra note 98, at 973.

was omitted in order to preclude protracted arrests and confinements and to secure prompt trials.

A further measure to secure prompt trials for officers was enacted on 17 July 1862 and became Article 71 in the Articles of War of 1874.[105] This article provided that officers arrested for purposes of trial, except at remote stations, were to be served charges within 8 days of arrest and brought to trial within 10 days of service or not later than 40 days after service when justified by necessity. If the charges were not served within 8 days, the arrest ceased. If after having been duly served, the officer was not brought to trial within 10 days or, when necessity dictated it, within 40 days, the arrest ceased. Officers released from arrest under this article could be tried within 12 months of release.

In 1917 the provisions of the articles relating to pretrial restraint were extensively revised. Officers and enlisted men, as well as "other persons subject to military law," were dealt with in the same article.[106] Although the officer charged with crime or a serious offense was to be placed in arrest, he could "in exceptional cases" be confined. A soldier was to be confined but when

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[105]Winthrop, supra note 98, at 992.

[106]The Articles of War, 1917, Art. 69.

charged with a minor offense, could be placed in arrest. "Other persons subject to military law" could be arrested or confined as circumstances required, but when charged with a minor offense, could be placed in arrest.

The release provisions of Article 71 of the Articles of 1874 which related solely to officers were changed by the substitution of the word "person" for "officer"[107] and redesignated as Art. 70 in the Articles of War of 1917. The release provisions related solely to arrest, not confinement. Although the Judge Advocate General of the Army did not distinguish between arrest and confinement, thus declaring Article 70 applicable to an enlisted man in pretrial confinement,[108] it is concluded that few enlisted men benefited from the change in wording because confinement was, for the enlisted man, the traditional mode of pretrial restraint.[109]

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[107]The Articles of War, 1917, Art. 70.

[108]Dig. Ops. JAG 1918, Vol. 2 at 126-128.

[109]The medium of arrest was not generally contemplated for the enlisted man. This is indicated by the fact that he was not specifically mentioned in the classes of persons punishable for a breach thereof in Article 69. Additionally, paragraph 54, Manual for Courts-Martial, 1917 restricted the application of Article 70 to officers by the following language.

> The fact that cases of officers put in arrest at remote military posts or installations are excepted

The Articles of War of 1917 were revised by legislation enacted on 4 June 1920[110] largely because of the Army's experience in World War I. The Judge Advocate General of the Army cited two major changes in the new law.

> Unnecessary delay on the part of an officer in investigating charges or carrying a case to a final conclusion is made an offense punishable by trial by court-martial. (AW 70) Resort to arrest instead of confinement pending trial in the cases of enlisted men charged with minor offenses is prescribed instead of merely being authorized. This places enlisted men upon the same footing as officers in respect of such offenses. (AW 69)[111]

It was also apparent that Congress was concerned over the extensive pretrial confinement of enlisted men.[112]

> from the application of Article 70 does not authorize an abuse of the power to arrest in these cases. . . . Though an officer, in whose case the provisions of Article 70 in regard to service of charges and trial have not been complied with, is entitled to be released from arrest, he is not authorized to release himself therefrom. [Emphasis original]

[110] 41 Stat. 759 (4 Jun. 1920).

[111] A Manual for Courts-Martial, U.S. Army, 1921, page IX.

[112] "The chief object of Congress in changing, by the Code of 1920, the provisions of AW 69 relating to arrest and confinement was to lessen resort to confinement, particularly of enlisted men, in cases where restraint is not a necessity, either to prevent the escape of the accused or to restrain him from further violence or for other like reasons. No soldier or officer will be ordered into, or retained in, confinement prior to trial by court-martial except where confinement is necessary for one of the reasons indicated." Note, paragraph 52, Manual for Courts-Martial, United States 1921.

The "unnecessary delay" provision was probably added because the provision for mandatory release from arrest had been deleted. In the 1920 legislation we see for the first time a requirement to forward charges within 8 days to the officer exercising general court-martial jurisdiction when the accused is being held for trial by that forum.

Article of War 69 did not change until it evolved into Article 10, Uniform Code of Military Justice. However, the Manual for Courts-Martial, 1928 contained a provision stating that confinement before trial was not a mandatory requirement and that "Arrest or confinement may, 'in the interests of the Government,' be deferred until arraignment . . ."[113] This is the first and the last time the phrase "in the interests of the Government" appears in the Manual for Courts-Martial. With the advent of the 1949 Manual, the commander was advised to utilize his discretion in determining the necessity for pretrial confinement.[114]

2. The Uniform Code of Military Justice and the Manual for Courts-Martial

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[113]Manual for Courts-Martial, United States 1928, para. 19.

[114]Manual for Courts-Martial, United States 1949, para. 19a.

a. The Uniform Code of Military Justice

By an act of 5 May 1950 Congress unified, revised, and consolidated the military laws which, in the past, had been applicable to each service individually. In the Code, Articles 9(d),[115] 10,[116] 13,[117] and 33[118]

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[115]10 U.S.C. § 809(d)(1964) Uniform Code of Military Justice Art. 9(d). "No person shall be ordered into arrest or confinement except for probable cause."

[116]10 U.S.C. § 810 (1964) Uniform Code of Military Justice Art. 10. Restraint of persons charged with offenses.

> Any person subject to this code charged with an offense under this code shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, such person shall not ordinarily be placed in confinement. When any person subject to this code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

[117]10 U.S.C. § 813 (1964) Uniform Code of Military Justice Art. 13. Punishment prohibited before trial.

> Subject to the provisions of article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during such period for infractions of discipline.

[118]10 U.S.C. § 833 (1964) Uniform Code of Military Justice Art. 33. Forwarding of charges.

> When a person is held for trial by general

relate to pretrial restraint.

Article 9(d) prohibits arrest or confinement without probable cause.

Article 10 provides that persons subject to the Code and charged with an offense under the Code "shall" be ordered into arrest or confinement as circumstances require. The accused, when charged with an offense normally tried by a summary court-martial, shall not "ordinarily" be placed in confinement. Immediate steps are required to inform the prisoner of the charge against him and to try him or release him.[119]

Article 13 delineates in statutory form the heretofore well-recognized rule[120] that confinement is not to be any more rigorous than that required to insure the prisoner's presence at trial. Punishments, other than those administered for disciplinary infractions,

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court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If the same is not practicable, he shall report in writing to such officer the reasons for delay.

[119]10 U.S.C. § 810 (1964).

[120]Winthrop, supra note 98, at 124.

are prohibited before trial.[121]

Article 33 states that the commanding officer of an individual arrested or confined for trial by general court-martial shall, if practicable, within 8 days after arrest or confinement, forward charges, completed investigation, and allied papers to the officer exercising general court-martial jurisdiction over the case. If such action is not practicable, the commander is required to report the reasons for delay.[122]

b. The Manual for Courts-Martial

The Manual for Courts-Martial, 1951 was promulgated to implement provisions of the Uniform Code of Military Justice, 1950. A new Manual was promulgated in 1968 and became effective on 1 January 1969. In the area of pretrial restraint, no substantive changes were affected by the latter document. For this reason, all citations will be to the Manual for Courts-Martial, 1969.

The Manual provides that the provisions of Article 10 as they relate to what type offenders are to be confined, are not mandatory but discretionary. "No restraint need be imposed in cases involving minor offenses."[123]

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[121] 10 U.S.C. § 813 (1964).

[122] 10 U.S.C. § 833 (1964).

[123] Manual for Courts-Martial, 1969, para. 18b(1). Whether an offense is minor depends upon the circumstances

Confinement before trial is warranted in two situations: first, to insure the presence of the accused at trial and second, because of the seriousness of the offense.[124]

Article 13 of the Code is implemented by paragraphs 18b(3) and 125 of the Manual. In addition to proscribing punishment (other than that administered for disciplinary infractions) before trial or before approval and execution of the sentence, prisoners being held for trial or awaiting action on their sentences are not required to perform punitive labor, observe duty schedules devised as punitive measures, or wear other than the uniform prescribed for unsentenced prisoners.

3. The Practice of Pretrial Restraint in the Military

a. The Historical Practice

The Articles of War provided for different treatment in the cases of officers and enlisted personnel. The enlisted man was generally confined prior to

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surrounding its commission. It generally includes misconduct not involving any greater degree of criminality than the average offense tried by summary court-martial. It ordinarily does not include an offense for which a dishonorable discharge or confinement for over one year may be imposed. See Manual for Courts-Martial, United States 1969, para. 128b.

[124]Manual for Courts-Martial, United States 1969, para. 20c.

trial,[125] the officer was generally placed in arrest.[126] The justification for this difference in treatment is enunciated by Colonel Winthrop.

> A theory which has been advanced to explain the practice of thus permitting an arrested officer to be at large is that the possession by him of a commission, which would be in danger of being forfeited if he violated his parole and escaped, is a sufficient security, answering to bail at the criminal law, for his not withdrawing himself from military custody and for his appearance before the court for trial at the appointed time.
> The officer gives bail in the value of his commission. This affords one great reason for the distinction taken between a commissioned officer and a soldier, in the circumstances of the arrest. . . . In all cases where the alleged crime, if proven, could not endanger more than the officer's commission, it may be said that this is a sufficient guarantee for the appearance of the accused, and that no other precautionary measure for that purpose would appear demandable.[127]

Certainly, not all enlisted men were confined prior to trial. Only those charged with "crimes"[128] were generally confined. Winthrop used the words "substantial offense" as analogous to the word "crime."[129] A substantial offense was something other than a "trifling

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[125]Winthrop, supra note 98, at 124.

[126]Id. at 110, Wales v. Whitney, 114 U.S. 564 (1885).

[127]Winthrop, supra note 98, at 114.

[128]Articles of War of 1874, Art. 66.

[129]Winthrop, supra note 98, at 123.

irregularity" or a "petty dereliction."[130] Thus, any offense other than a trifling irregularity or a petty dereliction was a substantial offense for which pretrial confinement was justified. Some leniency was exercised by General Order 21 in 1891. This order prohibited the confinement of enlisted men charged for trial by summary court-martial unless it was deemed necessary in particular cases.[131]

Arrest or confinement prior to trial was to a great extent a matter of command discretion[132] and very few guidelines were in effect which would aid the commander in making his determination. Neither a commander nor a provost marshal was free to impose punishment upon officers or enlisted men prior to trial[133] and an arrest, where the officer properly conducted himself, was not to be so severe as to prevent the due preparation of a defense.[134]

b. Present Practices

During the 1962 hearings before the Senate

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[130] Id.

[131] Id. at 124.

[132] Id. at 114, 117.

[133] Id. at 112, 124.

[134] Id. at 112.

Subcommittee on Constitutional Rights, the Assistant Judge Advocate General of the Army for Military Justice made the following statement regarding pretrial confinement.

> Such confinement may not be imposed unless actual restraint is deemed necessary to insure the presence of the accused at the court-martial or the offense allegedly committed was a serious felony.[135]

When no right to bail or release on recognizance exists, it is imperative that trials be held promptly and that pretrial confinees be kept at a minimum. For this reason, the majority of commanders require that pretrial confinement be kept to an absolute minimum. "To enforce this policy, army commanders publish orders to the effect that no personnel will be placed in pretrial confinement without the approval of the staff judge advocate."[136] Indeed, at some installations regulations are in effect which make pretrial confinement the exception rather than the rule.[137] The restriction by a senior commander of the power of his subordinates to confine is a legal one

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[135] Hearings on S. Res. 260 Before the Subcomm. on Const. Rights of the Comm. of the Judiciary, 87th Cong., 2d Sess., page 100.

[136] Id. at 847.

[137] E.g., Fort Riley Headquarters Regulation 22-2, 24 Mar. 1965, reprinted in part in United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

and a violation of the restriction vitiates the legality of the confinement.[138] Other protections are afforded one who is placed in pretrial confinement. He may not be ordered to perform hard labor as punishment[139] and some distinction must be afforded him in relation to the treatment of sentenced prisoners.[140] When the conditions of confinement are more rigorous than necessary to insure the presence of the accused, the eventual outcome of the trial may be effected by exclusion of a confession made during the period of confinement[141] or by a violation of military due process which will require reversal.[142] Additionally, a pretrial confinee punished for infractions of discipline under Article 13, Uniform Code of Military Justice may not be tried by court-martial

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[138] See United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

[139] Article 13, Uniform Code of Military Justice; see also, United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).

[140] Accord, United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).

[141] See United States v. O'Such, 16 U.S.C.M.A. 537, 37 C.M.R. 157 (1967) (confinement conditions rendered pretrial confession inadmissable).

[142] E.g., United States v. West, 12 U.S.C.M.A. 670, 31 C.M.R. 256 (1962) (mode of restraining the accused prior to and during trial violated military due process).

for that offense.[143] The Congress, in promulgating Article 13, sought to provide for the punishment of infractions "not warranting trial by court-martial."[144]

Under present concepts, pretrial confinement which is imposed lawfully is not rendered unlawful merely because it is not fully justified.[145] An accused's remedy, unless confinement conditions are intolerable thus resulting in a violation of military due process,[146] is founded upon the government's failure to afford him a speedy trial.[147] The concept of speedy trial is not predicated upon the accused's status of arrest or pretrial confinement alone. Restriction to an entire post has been held to impose upon the government the duty to proceed with greater dispatch.[148] Indeed, a speedy trial

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[143]United States v. West, C.M. 412664, 35 C.M.R. 639 (1965); United States v. Williams, 10 U.S.C.M.A. 615, 28 C.M.R. 181 (1959).

[144]Hearings on H.R. 2498 Before the House Armed Services Committee, 81st Cong., 1st Sess., page 916.

[145]Cf., United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959).

[146]Cf., United States v. Hangsleben, 8 U.S.C.M.A. 320, 24 C.M.R. 130 (1957).

[147]United States v. Hounshell, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

[148]United States v. Smith, 17 U.S.C.M.A. 427, 38

issue may arise notwithstanding the absence of any restraint.[149]

Any remedy for unwarranted restraint prior to trial must be speedy if it is to be effective.[150] The remedy afforded an accused under Article 98, Uniform Code of Military Justice, viz., preferring charges against the officer responsible for his confinement, has been termed hollow by the Court of Military Appeals.[151] The motion to the convening authority[152] or the military judge[153] to release an accused from pretrial confinement must necessarily be made after the case is referred to trial. Although action under Article 138,[154] UCMJ may be

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C.M.R. 225 (1968). (An Army Board of Review determined that restriction to the limits of Fort Hood, Texas was arrest "in fact.")

[149]See United States v. Williams, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961). (In determining the period of time for which the government is accountable, confinement or the formal presentment of charges, whichever occurs first, marks the beginning of the period.)

[150]Stack v. Boyle, 342 U.S. 1 (1951).

[151]United States v. West, 12 U.S.C.M.A. 670, 673, 31 C.M.R. 256, 259 (1962).

[152]Manual for Courts-Martial, United States 1969, para. 67b.

[153]Uniform Code of Military Justice, Article 39a.

[154]Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may

proper,[155] such action is time consuming because no effective guidelines have been established for its employment.[156] Habeas corpus or mandamus to the Court of Military Appeals, although a possible remedy[157] suffers from a similar impediment. Action by a federal district court is complicated by the exhaustion of remedies problem.[158]

The Chief of Naval Operations recognized the problems inherent in pretrial confinement, at least from the government's point of view, when he stated that "unjustified pretrial confinements deny the service the most effective use of manpower, [result in] overcrowded brigs, and hamper the corrections program for rehabilitation of convicted offenders."[159]

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complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon.

[155] Dig. Ops. JAG 1912-1940 sec. 427(1)(28 Sep. 1928) and sec. 479 (1932).

[156] See generally 2 Mil. L. Rev. 43.

[157] Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

[158] Owens v. Hinds, 189 F.2d 518 (10th Cir. 1951); Barrett v. Hunter, 180 F.2d 510 (10th Cir. 1950).

[159] OPNAV MESSAGE, 281427Z, Nov. 66.

The Army position has been that the formalization of control over pretrial confinement presently exercised by the staff judge advocate is undesirable for two reasons. First, "the determination is a matter of discretion properly lying within the province of the commander and is not judicial in nature" and second, ". . . there are numerous posts and units that do not have the services of a staff judge advocate or other judge advocate personnel immediately available."[160]

A recent Department of Defense Instruction permits pretrial confinement in excess of thirty days only when approved in each instance by the officer exercising general court-martial jurisdiction over the command which ordered the investigation of the alleged offenses.[161]

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[160] Hearings on S. Res. 260, supra note 135, at 873.

[161] See Department of Defense Instruction No. 1325.4, para. III A.2 (7 Oct. 68).

CHAPTER IV

CONSTITUTIONAL IMPLICATIONS OF THE MILITARY PRACTICE OF PRETRIAL RESTRAINT

A. General

It has been noted that the military commander's decision to restrain a serviceman before trial has traditionally been a matter of discretion. On the other hand, federal commissioners, magistrates, and judges are now restricted in the restraints they impose in non-capital cases before trial and, to a lesser extent, after trial. The impact of the United States Constitution upon the civilian practice has been scrutinized. To what extent Constitutional safeguards apply to personnel in the military generally and in the area of pretrial restraint specifically will be examined in this section.

During the first century and a half of our existence as a nation, the courts were loath to impose Constitutional restrictions upon the military. There was deemed to be no connection between the powers that the Constitution gave the Congress relating to control over the military in Article I, Section 8, on the one hand,

and Article III, Section 2, concerning the trial of crimes on the other.[162] It was said that "the two powers are entirely independent of each other."[163] Although courts-martial proceedings were generally recognized as being judicial in nature, their validity was determined not by constitutional, but by statutory standards.[164] One United States Supreme Court opinion went so far as to state that military law was the equivalent of due process to military personnel,[165] the Fifth Amendment notwithstanding.

It has long been recognized that one cannot read the Constitution in vacuo. The object of the document was to guarantee then-existing rights as they were recognized at the common law, not to extend guaranties to cases in which it was well understood the right could not be demanded.[166] Utilizing this approach, a federal

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[162]Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

[163]Id. at 79.

[164]Runkle v. United States, 122 U.S. 543 (1887); United States ex. rel. Creary v. Weeks, 259 U.S. 336 (1922).

[165]Reaves v. Ainsworth, 219 U.S. 296 (1911). It should be noted that this was not a criminal proceeding, but one wherein plaintiff alleged he had been deprived of a property right (his commission) in violation of the Fifth Amendment due process provision.

[166]Ex parte Quirin, 317 U.S. 1 (1942). (For

district court interpreted the Fifth and Sixth Amendments as being totally inapplicable to cases arising in the land or naval forces.[167]

In the more recent times, it is clear that the courts[168] and members of Congress[169] feel that certain

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instance trial by jury and presentment by grand jury are unknown in military tribunals.)

[167] Ex parte Benton, 63 F. Supp. 808 (N.D. Calif. 1945).

[168] E.g., Wade v. Hunter, 336 U.S. 684 (1949). Accused was tried for the rape of a German woman during the period when our Armies were invading Germany. At his first trial, all evidence on both sides had been submitted to the court-martial and argument had been presented when the court members requested the appearance of two more witnesses. Because they were sick and the Army to which accused was attached was advancing rapidly, the Commanding General withdrew the case from the court-martial. The accused was tried by another court-martial and was convicted, his plea in bar of trial having been denied. The European Theater Board of Review found that retrial was precluded based upon former jeopardy, but the case was approved. The District Court granted habeas corpus, the Court of Appeals reversed the District Court and the Supreme Court affirmed.

The Court did not hold that the Fifth Amendment did not apply to the military. It did hold that the situation here was not one encompassed by that amendment and went on to state that a literal reading of the amendment would preclude a rehearing when a trial judge discovered that a juror was prejudiced against either the government or the accused or in a case where the jurors were unable to agree on a verdict. They held that the record in this case was complete enough to show that military necessity was in fact the reason for the retrial of the accused.

See also, Burns v. Wilson, 346 U.S. 137 (1953); Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952).

[169] E.g., Report of the Comm. on the Judiciary,

fundamental guaranties of the Constitution which affect the basic fairness of a trial are applicable to the military.

B. The Traditional Approach

In 1951, shortly after being established by the United States Congress, the Court of Military Appeals opined that the rights of the serviceman are not derived from the Constitution, but from laws enacted by the Congress.[170] Less than two years later,[171] the court sustained Article 49, Uniform Code of Military Justice which provided for depositions by written interrogatories thereby depriving an accused of the rights guaranteed a civilian to confront the witnesses against him under the Sixth Amendment. In justification of its stand, the writer of the majority opinion stated:

U.S. Sen. Subcomm. on Const. Rights Pursuant to S. Res. 53, 87th Cong., 1st Sess., pages 36-37.

[170] United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). "For our purposes and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges upon the Constitution. We base them on the laws enacted by Congress." "True, we need not concern ourselves with the constitutional concepts . . ." "It was for Congress to set the rules governing military trials."
See also Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953).

[171] United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).

> Surely we are seeking to place military justice on the same plane as civilian justice but we are powerless to do that in those instances where Congress has set out legally, clearly, and specifically a different level. Moreover, in view of the fact that there are no satisfactory methods of permitting accused persons to be free on bond or on their own recognizance, it would be impossible for an accused to be present unless he was transported at the expense of the United States Government and under appropriate guard.[172]
>
> This is a penalty [derogation of a Constitutional right] which Congress has said he must pay because of the limitations inherent in the military system. What may be desirable must give way to the absolute necessities of the services.[173]

The dissenter made these observations:

> I have absolutely no doubt in my mind that accused persons in the military service of the nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.[174] . . . I cannot disregard a Constitutional safeguard for reasons of expediency.[175]

By 1960, the position of the dissenter had become that of the majority of the court. In holding that

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[172] Id. at 225.

[173] Id. at 226.

[174] Id. at 228.

[175] Id. at 231. The evidence admitted was particularly damaging to the accused because he was charged with intent to avoid service. Accused was contending that the weapon discharged accidentally. The prosecution entered into evidence the written interrogatories which showed that the accused had told the deponent he was going to get out of the Marine Corps and had asked what would happen if he were to shoot himself.

Article 49 of the Code, as it related to written interrogatories, conflicted with the Sixth Amendment, the court utilized rationale which was to appear in many subsequent cases dealing with Constitutional cases:

> [I]t was provided in Art. 10, Articles of War, 1786 that depositions might be taken in cases not capital, "provided the prosecutor and person accused are present at the taking of the same." Similarly, Art. 74, Articles of War, 1806 permitted the taking of depositions "provided the prosecutor and person accused are present at the taking of the same, or are duly notified thereof." See Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, pages 973, 983. The existence of such legislation at the time of the adoption of the Sixth Amendment is strong evidence that a military accused's right is satisfied by the opportunity to be present at the taking of depositions. Indeed, it has been said that the contemporaneous legislative exposition of the Constitution by its framers fixes the construction of its provisions. Myers v. US, 272 US 52, 47 S. Ct. 21, 71 L. Ed. 160.[176]

The argument proceeds in the following manner:

(1) We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted. Rather than reaching out for new guarantees, the Constitution was meant to secure for the future rights which were already possessed.[177]

(2) A most reliable means for determining both

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[176]United States v. Jacoby, 11 U.S.C.M.A. 428, 433, 29 C.M.R. 244, 249 (1960).

[177]Mattox v. United States, 156 U.S. 409 (1895); United States v. Wong Kim Ark, 169 U.S. 649 (1898).

what the law was at the time of the adoption of the Constitution and what the framers of the Constitution intended, is to study legislation contemporaneous with its adoption.[178]

(3) The Articles of War [being legislation of the Congress] in existence before and after the adoption of the Constitution and the Bill of Rights are effective indicators of the intent of the Congress and the framers of the Constitution.

Using this logic the Court of Military Appeals has decided that the Sixth Amendment does not guarantee to military personnel the right to legally trained counsel before a special court-martial,[179] and that the First Amendment does not allow an Army officer to blaspheme the President of the United States.[180] On the other hand, expansion by the United States Supreme Court of concepts which were recognized in military law at the time of the adoption of the Constitution and the Bill of Rights will be applicable to the military.[181]

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[178]Myers v. United States, 272 U.S. 106 (1926).

[179]United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

[180]United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

[181]United States v. Tempia, 16 U.S.C.M.A. 629,

Applying these principles to the matter of release before trial it is evident, at least in relation to enlisted personnel, that any notion of release was negated by the early Articles of War. Enlisted men were required to be confined and arrest was so much a part of the military practice regarding officers that is ommission was prejudicial to discipline and the due administration of justice.[182]

Accordingly, there is legal merit to the proposition that in the military, the right to bail or release before trial does not exist.[183] Two relatively current writers have addressed themselves to the subject; one stated that the requirement of bail in the military was inappropriate[184] and the other concluded that bail was

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37 C.M.R. 249 (1967).

[182]Winthrop, supra note 98, at 114.

[183]United States v. Vissering, 184 F. Supp. 529 (E.D. Va. 1960); Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411; United States v. Hangsleben, 8 U.S.C.M.A. 320, 24 C.M.R. 130; United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84; Hearings on S. Res. 260, supra note 135, at 99, 190, 194, and 847; Weiner, Courts-Martial and The Bill of Rights, 72 Harv. L. Rev. 266, 284 and 285 (1958); Dig. Ops. JAG, 1912, para. 1c at 481.

[184]Henderson, Courts-Martial and The Constitution, 71 Harv. L. Rev. 293, 316 (1957).

never intended to apply to the soldier.[185]

C. Due Process

Only one reported military case can be found wherein it was alleged that confinement prior to trial constituted a violation of due process under the Fifth Amendment.[186] The accused was confined prior to trial for nearly five months. The court noted that at no time did he complain that his confinement was illegal or not justified by probable cause and cited Article 9(d) Uniform Code of Military Justice. That article provides that "No person shall be ordered into arrest or confinement except for probable cause."[187] Probable cause to arrest or confine exists when the known or reported facts are sufficient to furnish reasonable grounds for believing that the offense has been committed by the person to be restrained.[188] After a brief survey of bail in the federal system, the court concluded that there is no right to bail in the military courts. The accused has three

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[185]Weiner, Courts-Martial and The Bill of Rights, 72 Harv. L. Rev. 266, 284 and 285 (1958).

[186]United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959).

[187]10 U.S.C. § 809(d)(1964).

[188]Manual for Courts-Martial, United States 1969, para. 20d (1).

remedies: first, he may move for a speedy trial; second, he may seek habeas corpus in the event a speedy trial is not afforded him; and third, he may institute charges under Article 98, Uniform Code of Military Justice.[189] The commanders nearly complete discretion to confine is restricted only by the requirement of probable cause. Such confinement does not violate "military due process" which has been defined as a denial of "fundamental fairness, shocking to the universal sense of justice."[190]

But under our concept of justice, which has been based upon the presumption of innocence until an accused has been adjudged guilty, can there be anything more shocking than confinement before trial which is not fully justified? In the words of Caleb Foote:

> There is almost universal recognition of the impropriety of punishing--and custody is punishment no matter what its name--one who is merely accused and has not been and may never be convicted.[191]

Two arguments are proposed as to why pretrial confinement, even though accomplished by the proper official and based upon probable cause that the confinee

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[189]United States v. Wilson, 10 U.S.C.M.A. 337, 340, 27 C.M.R. 411, 413 (1959).

[190]United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

[191]Foote, The Comparative Study of Conditional Release, 108 U. Pa. L. Rev. 290, 292 (1960).

committed an offense against the Code, may be a violation of military due process.

First, when speaking of confinement before trial, probable cause should be expanded to include not only whether the offense was committed, but whether there is reason to believe based upon the nature of the offense itself and/or any manifestations on the part of the accused, that he will not in fact appear for trial. If confinement is not necessary to assure the accused's presence, it is punishment. In the words of Judge Latimer, "confinement itself [is] a form of penal servitude and if the restraint imposed [is] more than that needed to retain safe custody, the unnecessary restrictions [are] in the nature of punishment."[192] It may indeed be argued that unjustified "detention before trial is equivalent to pretrial punishment."[193]

Second, the commander under the Uniform Code performs many judicial functions. Even though the Federal Rules of Criminal Procedure do not apply to military personnel[194] the Court of Military Appeals has equated

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[192]United States v. Bayhand, 6 U.S.C.M.A. 762, 766, 21 C.M.R. 84, 88 (1956).

[193]Hearings on S. 1357, supra note 5, at 15.

[194]Boeckenhaupt v. United States, 392 F.2d 24 (4th Cir. 1968).

the commander's functions to those of federal judicial officers.[195] The court has suggested that a request for a speedy trial be made to the accused's commanding officer in that he acts in a "military justice capacity."[196] Similarly the court has equated the commander's role to that of a federal judge in the area of an accused's suspected mental disorders[197] and for determination of the existence of probable cause to justify a search of an accused's person or belongings.[198] Confining an accused for an appreciable time[199] prior to a finding of guilt can be no less a judicial act than those enumerated. Therefore, the same considerations which are required of a committing magistrate should be required of a military commander.

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[195]United States v. Nix, 15 U.S.C.M.A. 578, 36 C.M.R. 76 (1965).

[196]United States v. Wilson, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959).

[197]United States v. Nix, 15 U.S.C.M.A. 578, 36 C.M.R. 76 (1965).

[198]United States v. Hartsook, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

[199]For instance see, United States v. Snook, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962) (4 mos); United States v. Davis, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960) (144 days); United States v. Wilson, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959) (379 days); United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959) (5 mos); United States v. Hounshell, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956) (10 mos).

CHAPTER V

APPLICATION OF RELEASE PRINCIPLES TO THE MILITARY

A. The Necessity for a New Approach

Comments of the United States Court of Military Appeals in two recent cases involving lengthy pretrial detention provide the best argument for a change in the policy in the military:

> Once again we are faced with the vexatious problem . . . because of . . . failure to comply with Articles 10 and 33 of the Code. . . .[200] [T]he facts and circumstances of the present case demonstrate another instance of a prejudicial invasion of the accused's rights.[201]

Just as it takes longer today to complete the proceedings in a court-martial than it did 15 years ago, pretrial processing time has risen commensurately.[202] This

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[200]United States v. Parish, 17 U.S.C.M.A. 411, 412, 38 C.M.R. 209, 210 (1968). (A conviction of robbery and attempted robbery was set aside and charges ordered dismissed.)

[201]United States v. Weisenmuller, 17 U.S.C.M.A. 636, 639, 38 C.M.R. 434, 437 (1968). (A conviction for possession and use of marihuana set aside and charges ordered dismissed.)

[202]Report to the Honorable Wilbur M. Brucker, Secretary of the Army, By the Committee on the Uniform Code of Military Justice, Good Order and Discipline in

rise is in part due to more careful preparation of cases by lawyers and to refinements in the courts-martial pretrial procedure. With the advent of more lawyers in the special court-martial, it may be anticipated that a similar rise in pretrial processing time will occur in that forum.[203] This is particularly true because the vast majority of administrative case processing will still be accomplished by the special court-martial convening authority's staff which will probably continue to perform military justice functions as an additional duty.

With more emphasis being placed upon affording an accused a speedy trial, it is clear that either the proceedings must be expedited or that some form of pretrial release be instituted. Judge Ferguson of The Court of Military Appeals, has stated that ". . . speed, particularly where there is no bail, is a very important element."[204] Were an accused free from restraint prior to trial, it would be proper to require him to show that

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the Army, 18 Jan. 1960, pages 286-287. (Pretrial processing times in general courts-martial cases are as follows: 1954: 26.5 days, 1955: 26.75 days; 1956: 43.75 days; 1957: 46.8 days; 1958: 54.6 days; 1959 (Jan.-Jun.): 57.5 days.)

[203]Report of The Fort Lewis Pilot Program, Military Justice Act of 1968, 20 Jan. 1969 at pages 13, 16.

[204]Hearings on S. Res. 260, supra note 135, at 194.

he has been prejudiced by any excessive delay.[205] With restriction to a company area[206] or even to an entire military installation[207] being termed arrest in fact thereby bringing into operation Articles 10 and 33 of the Code, the need for an effective alternative to pre-trial restraint is even more compelling.

B. The Necessity of Pretrial Restraint

1. Measured by the Nature of the Offense

The basis for pretrial restraint is to assure the presence of the accused at his trial. Traditionally we have denied bail for offenses for which the ultimate penalty might be adjudged. Therefore the concept has evolved that the seriousness of the offense is relevant only in that the greater the possible penalty, the more the reason to flee in order to avoid it's imposition. The human instinct for survival being what it is, there should be a greater urge to flee in a capital case "where the proof is evident or the presumption great" than there is in a capital case in which the evidence does not weigh

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[205]United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967).

[206]United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967).

[207]United States v. Smith, 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968).

as heavily against the accused. The greater the predictability of conviction, the greater the risk of flight.

Because it is so deeply rooted in our history,[208] there should be no objection to the confinement before trial of an alleged capital offender. This would be particularly true in the case where the evidence weighs heavily against him. Those charged with offenses against the security interests of the state should not be released before trial. This is not because the tendency toward flight is any greater, but simply because weighing the interests of the nation against those of the individual accused, the former must prevail in this sensitive area.

It would be a rare misdemeanor which would justify restraint prior to trial.[209] Similarly, there seems to be little rationale behind confining one charged with a non-capital, non-violent felony on that basis alone prior to trial.[210]

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[208]Massachusetts Body of Liberties, Dec. 10, 1641, Sec. 18.

[209]Assuming that a strong disposition toward flight is evinced, confinement would be proper.

[210]The writer is personally convinced that confinement before trial is not warranted for any offense, based solely upon the nature of the offense, to be tried before a special court-martial not empowered to adjudge

When charged with a non-capital violent felony, an accused's propensity to commit further acts of misconduct must be objectively analyzed in view of his prior record and present attitude. Because of the inherent difficulty in predicting human conduct,[211] certain procedural safeguards should be followed in these cases. If an accused is detained before a finding of guilt because we fear that he will commit subsequent acts of misconduct, either of two approaches should be followed. First, either the accused's case is placed on a separate docket and given priority treatment in terms of expediting his trial or second, he should be afforded a hearing within 5 days of his confinement at which he is represented by counsel. The hearing officer would be required to find that the confinement would not materially hamper the defendant's ability to prepare his case, that the government has a prima facie case, and that there is a reasonable

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a discharge. In other words, a soldier who is worth keeping is worth trusting. One who is incapable of this trust should be eliminated from the service. To advocate adoption of a firm policy prohibiting pretrial confinement for soldiers tried by special courts-martial might result in commanders recommending general courts-martial simply to avoid the prohibition.

[211] Hearings on S. 1357, supra note 5, at 177. "[W]ith the exception of extreme cases, which defendants will commit serious, subsequent offenses is difficult to predict."

likelihood that, if released, the defendant will commit a serious crime involving violence against the person of another. Regardless of which of the above courses of action is followed, some limiting period of pretrial confinement, excluding defense requested delay, should be established and the accused released at the expiration thereof.

2. Reducing the Risk of Flight Before Trial

The simplest and most effective means to deter flight before trial is to incarcerate all persons accused of crime. Even this means involves some risk that an accused will flee, but there is no question that it reduces it considerably. Before the bail reforms of the 1960's it was thought that forfeiture of material goods was, next to imprisonment, the most effective deterrent to flight or the commission of further crime. The reforms indicated that there were other means available to reduce the risk which were at least as effective as forfeiture of property. The risk of flight in the military may be reduced by employing these principles:

First, release only those individuals who desire to be released. An accused who is just as content to languish in the stockade as he is to be at liberty should categorically be adjudged a bad risk. Additionally he should

be required to affirm not only his intention to remain present for his trial, but his intent to stay out of trouble and perform all assigned tasks in a commendable manner.

Second, release of those individuals apprehended in an absent without leave status should be effected only in exceptional cases. A situation in which the condition which motivated the absence no longer exists might qualify as an exceptional case.

Third, provide criminal sanctions for those individuals who flee or otherwise violate the conditions of their release. Other than outright imprisonment, criminal penalties should be one of the more effective deterrents to flight. In the words of former Attorney General Ramsey Clark:

> Efforts to improve the bail system by increasing pretrial release are justifiable only if the releasees return. This objective can be promoted by tightening up the criminal penalty provisions.[212]

Fourth, an accused who is released before trial should be made aware of not only the criminal penalties involved in breaching his release agreement, but of the possibility of administrative discharge. Stress should be laid upon the fact that one who is discharged with less than

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[212] Id. at 23.

an honorable discharge faces very real problems in securing employment in civilian life.[213]

Fifth, if future behavior is predictable at all it must be on the basis of past behavior and a present situational analysis. It will be remembered that the success of the Manhattan Bail Project was founded upon the furnishing of information to a committing magistrate so that the latter could objectively measure the accused's propensity to flee or remain present for trial. The fact gathering process should be easier in the military where access to an accused's records and associations is generally good. Some factors which would assist in "risk analysis" might be: character and efficiency reports rendered in the past; present evaluation based upon written statements of superiors and subordinates; grade or rank; dependents who reside in the area and rely upon the defendant for support; civil and military disciplinary record; and an accused's espoused career aspirations. To gain the benefit of an objective evaluation, the accused should be assessed without regard to the offense with which he is

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[213] See generally, Hearings on S. Res. 260, supra note 135, at 315, 328, 331, 335 and 366. (Quare: Were the enlisted man, in a proper case, to post his honorable discharge as security for release before trial would we have a situation comparable to the officer of Colonel Winthrop's day giving bond in the value of his commission?)

charged. The evaluation should be in writing and a point value attached to each risk factor.[214]

Sixth, during the period of pretrial release, the accused must be made aware of the fact that someone cares about his case. This showing of care on the part of the attorney representing the accused might well be a reason for the success of the Tulsa Plan. For this reason, the military defense counsel assigned to the accused's case should be readily available, not only to assist in case preparation but to assist in other legal or quasi-legal matters which may build up in an accused's mind with the result that he is less inclined to adhere to the release provisions.

Seventh, in the final analysis we must to a great extent rely upon self-discipline and a desire on the part of the individual soldier to do the right thing. The factors of self-respect, leadership, efficiency, motivation, productivity, loyalty, morale, esprit de corps, and concept of mission can only be imbued by the commander and his staff. These intangible but extremely important

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[214] E.g., Hearings on S. 1357, supra note 5, at 57. (Systems like the Manhattan Bail Project which utilize objective standards by employing a point system experience a higher rate of favorable recommendations and good records of appearance. Projects whose evaluations are subjective have a generally lower rate.)

factors could contribute more than any other single factor to a successful pretrial release program.

CHAPTER VI

CONCLUSIONS

The preceeding principles are espoused with full realization that there are significant differences between the administration of justice in the military and civilian communities. Senator Sam J. Ervin, Jr. recognized this difference when he said:

> The administration of justice is one of the primary functions of any civil government and may be classified as perhaps its most sacred function. [T]he administration of justice in the armed services is designed to be disciplinary in purpose or to lay down the basis for separation of persons unsuitable or unfit for military service from the armed services.[215]

The object of the civil law is to create the greatest benefit to all in a peaceful community; the object of military law is to govern armies with a view toward maintaining an effective fighting force. Even critics of military law recognize that an undue diversion of energy in the areas of administration of military justice may have an adverse effect upon prime military goals.[216] Today military law

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[215] Hearings on S. Res. 260, supra note 135, at 349.

[216] Id. at 253.

is utilized to perform a dual function: to insure discipline and to administer justice. The theory in vogue before the First World War was that the service volunteer entered into a contract with the Government under which he waived all his rights under the Constitution. The theory is no longer tenable because of the evolution in the composition of the Army. The Army is no longer a small band of volunteers content to serve for bed, board, and $5. a month. The Selective Service System has made the Army a representative part of the community. As the community attains greater rights and freedoms, demands for similar rights will be made in the military community. The fact that these demands are heeded is evidenced by the Uniform Code of Military Justice and the Military Justice Act of 1968.

In these times when the very basis of military jurisdiction is being attacked because of divergence of military and civilian standards of justice,[217] it would seem reasonable to provide the military man "the protections he would have if he were a civilian, as nearly as possible. . . "[218] For a number of years now, the Court

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[217] O'Callahan v. Parker, _____ U.S. _____ (1969).

[218] Hearings on S. Res. 260, supra note 135, at 204.

of Military Appeals has adhered to the view that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of the armed forces.[219] Since pretrial release is not expressly inapplicable, it must by necessary implication be inapplicable. The necessary implications are that mandatory release is incompatible with the commanders complete control over his personnel and would result in an even greater derogation of his authority. There are two answers to these objections. First, the very idea of military law and regulation is a limitation upon the absolute nature of command power[220] and second, the entire concept of discipline has changed with the advent of newer weaponry. In the words of S. L. A. Marshall:

> The philosophy of discipline has adjusted to changing conditions. As more and more impact has gone into the hitting power of weapons, necessitating ever widening deployment in the field of battle, the quality of the initiative in the individual has become the most praised of the military virtues.[221]

Under the concepts of pretrial release which have

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[219]United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[220]See generally, Janowitz, The Professional Soldier, Chap. 3, 1960.

[221]Marshall, Man Against Fire 22, 1947.

been enumerated, the majority of persons charged would be released before trial. In most instances the commander would be required to "objectively" evaluate each man's propensity to flee. This should not be a time consuming procedure. If he is satisfied that the accused will remain present and perform his duties in a military manner, an agreement can be entered into between the commander and the accused. A violation of the agreement will cause revocation of release and pretrial restraint will result. If the accused absents himself before trial he is almost sure to be apprehended[222] and his flight prior to trial may be considered in determining a consciousness of guilt of the offenses charged.[223]

If the accused is confined before trial by the immediate commander, the confinement should be reviewed by an intermediate commander who would have the power to release the accused. In the event the intermediate

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[222]Hearings on H.R. 3576, H.R. 3577, H.R. 3578, H.R. 5923, H.R. 6271, H.R. 6934, H.R. 10195 and S. 1357 Before Subcomm. No. 5 of the Comm. on the Judiciary, 89th Cong. 2d Sess. at page 21. (Ramsey Clark told the House Subcommittee that "in the history of The Federal Bureau of Prisons, there have been only 12 individuals, out of hundreds of thousands incarcerated, who have escaped and not thereafter been accounted for by either apprehension or recovery in some fashion.")

[223]United States v. Johnson, 6 U.S.C.M.A. 20, 19 C.M.R. 146 (1955).

commander approves the confinement, the accused should, upon application, be entitled to an administrative hearing.[224] If the determination of the commander is substantiated by evidence in the file, it should not be disturbed. If, on the other hand, the determination cannot be substantiated, the accused should be released and the aforementioned agreement entered into between the accused and the commander.

By employing the foregoing principles we not only afford an accused an opportunity for a fairer determination of the need to confine him before trial, but we act in the best interests of the government by allotting manpower to the purpose for which it was intended. Hopefully, the adoption of these proposals will not only obviate the situation where one convicted of a serious felony will gain his freedom simply because the government was unable to prove that it acted diligently in the prosecution of his case, but will avert the long and ofttimes unnecessary restraint of one merely accused of an offense.

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[224] A judicial hearing under Article 39a, Uniform Code of Military Justice is infeasible in that the hearing may not take place before the case is referred to trial.

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