TREATMENT OF MILITARY YOUTHFUL OFFENDERS

A Thesis
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THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES 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.

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SCOPE

A comparison of treatment afforded by the Federal Youth Corrections Act, 18 U.S.C., Ch. 402, with treatment of soldier offenders of comparable age; consideration of methods to integrate soldier-offenders into the Federal treatment plan or steps necessary to establish a similar procedure in the services, statutory and administrative changes necessary to establish such a program, and a discussion of the desirability of a youthful offender program for the services, including its possible effect on discipline.

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CHAPTER I

INTRODUCTION

The time is 1500 hours on a Tuesday afternoon. The room is quiet, yet the tenseness of the situation is visible on the faces of those present. Suddenly the silence is shattered by a firm voice declaring, "The Court will come to order, Judge John Smith presiding." Judge Smith looks toward the defense counsel and his client and requests that they both approach the bench. The judge slowly and audibly addresses the accused, "Specialist Doe, three weeks ago the members of this court-martial found you guilty of the wrongful possession of marijuana in violation of Article 134, of the Uniform Code of Military Justice. The maximum punishment permissible for this offense under paragraph 127c of the Manual for Courts-Martial 1969, is Dishonorable Discharge, confinement at hard labor for five years, total forfeitures and reduction to the lowest enlisted grade. The court members have made their finding as to your guilt, it is now my duty to pass sentence upon you. This morning you presented several witnesses and affidavits in extenuation and mitigation and the trial counsel has also presented evidence tending to rebut your position. Counsel have both presented their positions and you were afforded the opportunity to make a statement. Is there anything you wish to say now before

I proceed to pass sentence?" The accused in a low voice murmurs, "I guess it doesn't matter now. What can I say? With a Federal conviction on my record, I'm finished for life regardless of how many years you give me."

Judge Smith, who is an officer in the Judge Advocate General's Corps, looks sternly at the accused and continues, "I have thoroughly reviewed your pre-sentence report and I feel that it contains a fair amount of information about your childhood, family, civilian conduct and activities and performance while on active military service. I'm also aware of the fact that you had some difficulty with a non-commissioned officer eleven months ago resulting in administrative punishment under Article 15 of the Uniform Code of Military Justice. So you see I think I have a pretty good opinion of you as an individual. It is my opinion that you have the potential of being a lawful and useful soldier and a good citizen. Based upon your civilian record and the military reports before me, including the evidence presented at trial I hereby sentence you to be discharged from the service with a bad conduct discharge, to forfeitures of $65.00 per month for 24 months and to be confined for an indeterminate sentence under the Military Youth Corrections Act, Section 406b. It is further ordered that you will be confined as soon as practicable in the Fort Worthwhile Correctional Confinement Facility.

Your counsel can advise you further as to the meaning of my

sentence. However, I will say to you that it is a maximum four year sentence requiring that you be paroled within two years before the expiration of the four year term or sooner as the Youth Division, Army and Air Force Clemency and Parole Board deems appropriate. You will have the opportunity to prove yourself and if you do so, the Youth Division may unconditionally discharge you from parole. This will result in an automatic set aside of this conviction and sentence of discharge thereby resulting in the reinstatement of your grade as though you were never convicted. However, the monies forfeited pursuant to this sentence will not be recoupable. The opportunity is awaiting you and I have faith in your ability to make good. Now it's up to you. Good Luck!"

The accused salutes the judge, turns and walks with his counsel to his seat. Specialist Doe is stunned. He remains seated pondering the meaning of the sentence he has just received. His defense counsel advises him that the sentence under the Military Youth Corrections Act is in fact an outstanding opportunity afforded to only those offenders which are considered of potential value to society and subject to rehabilitation. Hesitantly, counsel adds that, "based upon prior experience and depending upon your cooperation and behavior you'll probably be out on parole within a year and back to duty. If you keep your nose clean, and soldier as I think you can, don't be surprised if you are unconditionally released with your conviction set

aside. There is not much more to say than, you have a goal that's worth striving for which thousands of others never had and many of which would be happy to switch places with you. You will be leaving for Fort Worthwhile in a day or so and I'll see you before your departure."

The above court-room scene is fiction as far as present military criminal procedures are concerned. However, the vesting of sentencing duties upon the judge rather than the court members (jury), the detailed pre-sentencing report and the alternate systems of sentencing are common practice in the Federal District Courts.

Recent legislation has brought the military trial procedure somewhat closer to the Federal system. The Military Justice Act of 1968, provides limited sentencing authority to military judges in non capital cases tried before a special or general court composed only of a military judge, if the accused so requests and if the military judge approves. The emergence of this new area of responsibility upon military attorneys appears to be a welcomed step forward in the practice of military criminal law. Military attorneys have up to the present devoted considerable time in keeping abreast of the latest military and civilian judicial decisions. Counsel must not only know what various courts and boards of review are construing the law to be but also face the perplexing situation of deciding to what extent if any, United

States Supreme Court decisions alter the military law. For example, the United States Supreme Court recently upheld a criminal conviction in the case of Schmerber v. California[1] based upon evidence of blood extracted from the suspect over his objection and in the presence of his counsel. With the creation of the new sentencing authority of military judges, it is obvious that greater emphasis must now also be applied to research and analysis of the field of military sentencing and penology.

Present day concepts and practices of penology are the product of numerous years of evolution. Future concepts will likewise bear their fruit from the present systems and thoughts. A brief discussion of the more significant penological developments in a historical setting will assist in the analysis of the present system of sentencing and punishment and provide a vehicle for the evaluation of any projected reform. The discussion that follows is designed to serve this need.

Since the field of sentencing and penology is quite broad with many collateral aspects, this thesis will be limited to a comparison of treatments afforded the sentenced prisoner to confinement under the Federal Youth Corrections Act and the present United States Army system with commentary as to whether reform is needed.

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1. 384 U.S. 757 (1968).

CHAPTER II

EVOLUTION OF PUNISHMENT

A. Requital By Vengeance

John Lewis Gillin in describing the evolution of punishment said, "Primitive man shares with the animals the emotion of resentment at injury. Man's superior intelligence, however, has led him to refine his methods of reaction and therefore to multiply the devices with which he punishes injury."[2] Gillin further indicates that in earliest times, the simplest and most expedient means of retribution for a wrong doing was by way of private vengeance. The injured party simply took it upon himself to inflict an injury that was within his powers against the offender.

In 1901, a French expedition discovered a monument upon which was engraved one of the earliest recorded acts of a ruling authority to control the conduct and state the responsibilities of persons within its society. The discovery, a block of black dirorite, nearly eight feet high, broken into three pieces was the Code of Hammurabi by the king of Babylon, about 2250B.C.. The Code's prologue describes Hammurabi and his mission as, the exalted prince, the worshipper of the gods, to cause justice to prevail in the land, to destroy the wicked and the evil, to prevent the strong

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2. J. L. GILLIN, CRIMINOLOGY AND PENOLOGY, at 293, (1926).

from oppressing the weak, to go forth like the Sun. . ., to enlighten the land and to further the welfare of the people.[3]

The Code established rules of law and procedure in simple terms concerning almost every conceivable aspect of social behavior. Each section specifically detailed duties, responsibilities and punishments applicable to wrongdoers in their capacities as accusors, judges, witnesses, assailants, disputents over property ownership, liability of sureties and for interest, tortious and negligent acts, debts, bailments, principals and agents, marriage, divorce, rights of concubines, settlement of decedent estates and numerous other areas. The Code clearly intervened into areas that were previously personal details of social and economic life. Although the Code deserves great credit and praise because of its comprehensive establishment of a universal system of duties and punishments throughout the kingdom, examination of the punishments provided for wrongdoers clearly indicates the purpose of vengeance. Punishments included: death, mutilation, branding, and banishment. Some of the methods used to cause death included: death by drowning, burning, and impaling. Punishment by death was provided for a wide range of acts. For example, if the accusor in a capital case could not prove his accusation he would be put to death; one who testified falsely in a capital case was to die; if a thief stole

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3. R. F. HARPER, THE CODE OF HAMMURABI, KING OF BABYLON, at 3, (1904).

an ox or sheep, ass or pig, he had to restore it thirty-fold or be put to death if he could not do so; and if a man allege certain property as his but be not able to prove it, he was put to death for "he has stirred up strife." The list runs on and on.

The underlying concept of vengeance is best illustrated in section 230 of the Code which provides that if a builder constructs a house which is not firm and it collapses and kills the son of the owner then the son of the builder shall be put to death.[4] It might be said that the Code suited the society of its time. Its severe and somewhat savage sort of equity, including the literal application of the eye for an eye concept, must surely have had a deterrent nature. However, on the whole the punishments appear to have been purely based on a system of requital by vengeance. Aside from the punishment aspects of the Code, it is an amazing body of laws because as noted above it covers almost every conceivable area of human relation. Those interested in the law of torts may be surprised to find in section 230, repeated above, what this author believes to be one of the earliest propositions and applications of the rule of absolute liability.

B. Requital By Expiation

Centuries later, the Roman Empire produced a body of laws which were actually a compendium of numerous legislations by

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4. Id. at 11-97.

emperors from the time of the XII Tables, around 450 B.C., through Justinian.[5] Under early Roman Law, legal actions were mostly private in nature with the state taking little participation. The XII Tables provided a summoning process by which a victim could request the accused to appear before a tribunal, however, there was no punishment provided for disobeyance of the summons. The victim would have to bodily drag the accused into court and if the accused was stronger or had body-guards he could avoid the judicial process. As Rome grew so did her judicial system and eventually failure to obey a summons was punishable.[6] Gradually, the sovereign intervened into what hitherto were private legal actions until a body of law evolved that was not only for Romans but of universal adaptability.

The student of law may marvel at the transition and progress evidenced in the areas of pleadings, practice, rights, duties and remedies as discussed by Gaius[7] concerning Roman Law. However, with all due respects to these achievements, offenders received punishments borrowed from previous cultures in addition to some Roman inventions. It appears that every method of execution was

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5. For a detailed analysis of legislative histories and Roman Laws see, W. A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW, (1876).
6. Id. at 805.
7. Gaius is credited as being a great writer and jurist to whom present day historians owe their knowledge of Roman Law prior to Justinian. His treatises of Roman Law have been translated and compiled in a text by E. POSTE, ELEMENTS OF ROMAN LAW BY GAIUS, (2d ed. 1875).

practiced, including crucifixion, burying alive, burning alive, decapitation and even hurling from the Tarpeian Rock. A popular punishment was to sentence the offender to fight with wild beasts in the arena. This punishment served the additional function of entertainment. Numerous varieties of noncapital punishment were administered. They included imprisonment for life to the mines with a variance in the degree of punishment based upon the weight of the chains to be worn, forfeiture of properties, fines, flogging or beating with sticks, banishment from the Republic resulting in deportation, forfeiture of citizenship, degredation of rank and numerous other penalties.[8] As the list of punishments suggests, the ancient goal of vengeance still existed with the exception that the sovereign was now treated as an injured party to the offense and the punishment appeared to be transformed into an expiation.

The centuries that followed the period of the Roman Empire are commonly known as the "Middle Ages". Social systems, such as feudalism, flourished. The individualistic characteristics of these enclaves quickly weakened those existing tribunals that remained until the progress made by the Roman legal system was replaced by superstitious practices in determining the truth of testimony and the guilt or innocence of an accused. Testimony

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8. Supra note 4, at 905-906.

under oath became suspect and to remove the evaluation of evidence from fallible human judgment the decision was placed in God (heaven). Truth or innocence was determined by such methods as ordeal and battle. Ordeals required the accused to prove his innocence by such tests as: handling hot irons, plunging his hand into boiling fluids, or even being thrown into a river while bound to see if he would float or sink. Where trial by battle was provided, it was accomplished by battle between the two litigants or if they were unable to personally do so, either could hire a proxy known as a champion to fight for him. Accordingly, a group of professional champions emerged who travelled about selling their skills as proxies for battle.[9]

Along with these superstitious and barbaric methods of determining the guilt or innocence of an accused, there grew with each century of the medieval period a greater severity of all types of punishment. More crimes were classified as punishable by death and correspondingly there was an increase in the variety of methods to perform executions. Criminologists such as Korn and McCorkle[10] indicate that by the fourteenth century the most common penalty was death. Further, that executions became an art and a public spectacle. Its practitioners became some of the foremost enter-

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9. For a historical examination of society during the middle ages see H. HALLAM, VIEW OF THE STATE OF EUROPE DURING THE MIDDLE AGES, (6th ed. 1858).
10. R. R. KORN & L. W. McCORKLE, CRIMINOLOGY AND PENOLOGY, at 395, (1959).

tainers of their day because aside from devising new ways of killing, the art required that the victim be kept alive as long as possible while undergoing various atrocities. Also used with equal skill was the art of mutilation. This type of punishment was also applied with much extravagance; however, the victim was to ultimately live rather than die.

C. Punishment For Deterrence.

In 1764, an Italian professor of political economy, Cesare Bonesana, Marchese de Beccaria, published his famous Essay on Crimes and Punishments. This essay was soon translated into several languages and Beccaria became the head of a new movement. His essay was a critical attack upon the system of laws, punishments and procedures utilized by societies in his time. Some of the principles which he proposed are worthy of consideration since they appear to be just as apprapo today as they were in 1764. Baccaria proposed that:

(1) Each society should seek to achieve the greatest happiness of the greatest number by legislating prudent laws.

(2) Laws should reflect the needs of the society in which they are being applied and not those from the past.

(3) Crimes will be less frequent when laws are clearly understandable and known by the people.

(4) Crime should be treated as an injury to society. Therefore, the only appropriate consideration to be applied is the

measure of injury done to society.

(5) The purpose of punishment should be the prevention of others from committing like offenses. The infliction of death and torture does not correct a wrong. The law should provide for the strongest punishment which will leave lasting impressions on the minds of others, with the least amount of torment to the offender's body.

(6) The credibility of witnesses should be determined subjectively. In weighing the value of testimony, presumptions should be against the accusor and not the accused. Trials should be open to the public and the accused be judged by his peers. The accused should also have the right to exclude a certain number of these jurors.

(7) Secret accusations should be abolished because it fosters suspicion, hatred and loss of security by the people in a society. Torture of an accused should be abolished. Confessions by torture during trial of both charged and uncharged offenses should be prohibited for pain is not the test of truth.

(8) Persons accused of crimes should be tried expeditiously and if found guilty receive swift punishment. Since the purpose of punishment is to deter others, the greatest deterrant effect is achieved when crime and punishment are closely related thereby showing the members of a society what unavoidable consequences of crime awaits them. It is not the severity of punishment which

prevents crime but rather its certainty.

(9) Punishment should be applied equally regardless of status of the criminal based upon the injury caused to society. However, punishment by death should be abolished since it does not deter crime and society lacks authority to take another's life. Life imprisonment is more appropriate because it provides a lasting impression to others of what punishment may be expected.

(10) The use of imprisonment must be carefully exercised and conditions improved. Persons accused of crimes and those convicted should not be imprisoned together. Convicted prisoners should be separated according to degrees and classes of crimes.[11]

The reader can judge for himself the relevant merits of the above proposals at the time they were made and their significance even today.

Baccaria's attack upon the unhumanistic penological systems of his day was among the first of a long series of authors properly categorized as pioneers in the field of criminology and penology which stretched close to two centuries.[12] His essay

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11. THE MARQUIS BECCARIA OF MILAN, AN ESSAY ON CRIMES AND PUNISHMENTS, at 1-160, (1872).
12. Among those following Beccaria are: Jeremy Bentham, Alexander Maconochie, V. John Haviland, Isaac Ray, Charles Doe, Henry Maudsley, Cesare Lombroso, Gabriel Tarde, Hans Gross, Rafaele Garofalo, Enrico Ferri, Emile Durkheim, Pedro Dorado Montero, Gustav Aschaffenburg, Charles Buckman Goring, and Willen Adriaan Bonger. It is interesting to note that eight of them were

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lawyers, five were members of the medical profession, two were sociologists, one a naval officer, one a geographer, and one an architect. Their individual theories of reform resulted in the formation of two major schools of thought. The Classical School, founded by Bentham and Beccaria was developed in the eighteenth century in an attempt to reform the legal system and to protect the accused against harsh arbitrary actions of the state. The Positive School, founded by Lombroso, Garofalo and Ferri developed in the nineteenth century as an attempt to apply scientific methods to the study of the criminal. Briefly speaking, the Classical School defined crime within the strict limits of the law, placed great emphasis on the crime but not on the criminal, and urged that the law be applied equally. The Positive School rejected the Classical School's legal definitions and took the approach that punishment should be replaced by scientific treatment of criminals with the ultimate goal of protecting society. ThePositive School has dominated the thinking of American criminologists and finds much support in the fields of biology, psychiatry, psychology, social work, sociology and anthropology. As a result of this School, criminology has developed an interest in the individual offender, his personality, intelligence, family background and environment. Ultimately, punishment was to fit the criminal and not the crime. This system is also called the individualistic approach and might well be said to have laid the foundation for the establishment of such modern day measures as parole, probation, and indeterminate sentencing. For an introduction into the contributions of the above named pioneers and an explanation of their respective schools of thought see H. MANNHEIM, PIONEERS IN CRIMINOLOGY, (1960) and R. SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT, (2d Fr. ed. R.S. JASTROW transl. 1911).

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D. American Penology

Although marked changes were being advocated in different countries for the improvement of penological systems, results were not immediately forthcoming in England, America and other nations. As mentioned earlier, the death penalty was very popular in exterminating the wrongdoers from society. In America prominent persons as Thomas Jefferson advocated the abolition of capital punishment for the majority of offenses covered. However, the demands for reform by members of the Quaker religion in Philadelphia have been credited with leading the world in adoption of humane criminal laws. During the period 1783 to 1796, Pennsylvania gradually substituted imprisonment for death in all offenses except murder. This change in punishment produced a new phenomenon in the use of prisons. With the death sentence curbed, sentences to long term imprisonment was substituted resulting in the need of prisons to handle this new population. The existing facilities were built for short term inmates and not conceived for the new influx.[13] The prison system in America was inherited from England and its condition as a whole was described by Elmer Hubert Johnson as:

> "The general condition was one of lechery, debauchery, moral corruption and pestilence. In the American colonial period, persons of both sexes and all ages were confined in cramped, primitive quarters lacking the most rudimentary facilities."[14]

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13. B. McKELVEY, AMERICAN PRISONS, at 2, (1936).
14. E. H. JOHNSON, CRIME, CORRECTION AND SOCIETY, at 496, (1964).

After much public demand, in 1791, a separate building was constructed within the Walnut Street Jail in Philadelphia for the solitary confinement of convicted felons. This permitted the segregation of suspects, witnesses, misdemeanents, and the sexes. These solitary confinement cells were the first ever constructed and utilized in America. During the period 1791 to 1801, the Walnut Street Jail was transformed into the model prison of its time. It may be of interest that during this period the prison was administered by a woman, Mrs. Mary Weed.[15]

The initial reforms at the Walnut Street Jail were followed by the development and application of several other systems.[16]

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15. H. E. BARNES & N. K. TEETERS, NEW HORIZONS IN CRIMINOLOGY, at 392-394, (2d ed. 1951).
16. Four different penal systems developed and each became known by a name which closely describes them. They are: the separate system, the congregate system, the reformatory system, and the convict-lease system. The separate system was put into effect in 1829, at the Eastern Penitentiary, Pennsylvania. Its concept was to provide large enough quarters for each inmate to be celled separately thereby resulting in the performance of his work, exercises and his entire period of confinement in seclusion without ever speaking or seeing another inmate. The objective of this system was to prevent "contamination" between inmates. By keeping them secluded, it was believed that this would assist in correctional efforts and prevent any bad influences from being communicated to others. The congregate system, frequently called the New York Auburn system, was put into effect in 1819. Its general objective was to maintain silence amongst the inmates. They were permitted to work together during the day in shops, etc., in silence but their non working time was spent in separate cells. This system with some modification

Even the judiciary was undergoing reform for in 1899, the first juvenile court was created in Chicago, Illinois. By 1925, forty-six states had enacted juvenile court legislation with the majority setting the jurisdictional age up to eighteen.

1. Federal Prisoners

Federal prisoners were confined in local county and state facilities. This was necessary due to the fact that prior to the 1890's there were no civilian federal penitentiaries. During a long period of time, accurate records were not maintained of federal prisoners and their whereabouts was often unknown. Embarrasing as it may seem, there were apparently periods when the number of federal prisoners was not even known. It is reported that it took a personal appeal to President Cleveland to produce statistics on prisoners. In 1895, there were 2,516 federal prisoners in state prisons and about 15,000 in county jails.[17] In 1891, a law was passed directing the Attorney General

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became widely accepted by other states. The reformatory system was introduced by the establishment of the Elmira Reformatory in New York which opened in 1876. The objective of this revolutionary system was to reform prisoners between the ages of 16 to 30, by means of education, training in a vocation, guidance in conduct and an overall individualistic treatment based upon a point system leading up to the highest grade of parole. The convict-least system and all of the above systems are discussed in depth by experts and authors having actual knowledge of each in two volumes: S.J. BARROWS, PRISON SYSTEMS OF THE UNITED STATES, (1900) and S. J. BARROWS, THE REFORMATORY SYSTEM IN THE UNITED STATES, (1900).

17. Supra note 13, at 169.

and the Secretary of the Interior to purchase three sites for the establishment of federal prisons. The law also provided that the facilities should be constructed so as the cells and yard space would permit inmates 20 years and under to be segregated from the older prisoners.[18] Although authority was granted, no funds were made available to accomplish the purchases and construction. Therefore in 1895, another Act was passed providing for the transfer of the military prison at Fort Leavenworth, Kansas, from the Department of War to the Department of Justice. This was to be effective immediately and the facility was to be known as the United States Penitentiary. The inmates were to include both those convicted by courts-martial and by federal civilian courts.[19] In 1896, another law was passed authorizing the Attorney General to select a site on Fort Leavenworth and build a penitentiary to house at least 1,200 inmates. This law further provided that upon completion of this penitentiary the buildings that were transferred from the Department of War in 1895, would be restored to their previous authority.[20] And so the federal prison system was born. Although the prison at Fort Leavenworth was finally erected in 1905, and several other facilities were obtained for federal prisoners, the legislation cited did not provide for any sort of

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18. 26 Stat. 839 (Mar. 3, 1891).
19. 28 Stat. 956 (Mar. 2, 1895).
20. 29 Stat. 380 (Jun. 10, 1896).

system to classify prisoners or institutions in order to provide for an individualistic approach to discipline, treatment and care of inmates. Accordingly, Congress decided in 1930 that a management system was necessary to carry our these functions. The Federal Bureau of Prisons was organized in 1930 to accomplish this task.[21] The Congress also centralized all parole activities by establishing a Board of Parole within the Department of Justice to exercise approval authority over all federal prisoners recommended for parole.[22]

2. The United States Board of Parole

The United States Board of Parole is an autonomous body exercising independent judgment within statutory authority, on parole matters, but is part of the Department of Justice and subject to the Attorney General for administrative matters. The Board of Parole is presently composed of eight members appointed by the President by and with the consent of the Senate. They serve overlapping six year terms and are subject to reappointment. The Attorney General from time to time appoints one of the members to serve as chairman of the Board.[23] There are no statutory qualifications for membership, however most appointments have been primarily of persons employed in the professional correctional

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21. 46 Stat. 325 (May 14, 1930).
22. 46 Stat. 272 (May 13, 1930).
23. 18 U.S.C. 4201.

field or in related fields dealing with human behavior.[24] The Board's major powers can be summed up as follows:

(a) to determine the date of parole eligibility for adult prisoners committed under the so-called indeterminate sentencing statutes

(b) to grant parole in its discretion

(c) to prescribe terms and conditions to govern the prisoner while on parole or mandatory release status

(d) to issue warrants for the retaking of parole and mandatory release violators

(e) to revoke parole or mandatory release and to modify the conditions of supervision

(f) to re-parole or re-release on mandatory release[25]

The Parole Boards' powers are exercised over federal prisoners which can be delineated into three major groupings as follows:

(a) Regular adult violators of the criminal laws of the United States

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24. The Board is also assisted by a small staff of professionally trained assistants and clerical personnel, by the case workers and administrative personnel in the various federal correctional institutions and by the United States Probation Officers who are employed by each of the Federal District Courts. The former group furnished reports and related duties and the latter group act as field agents for the parolees and others released under supervision to the community. DEPARTMENT OF JUSTICE, FUNCTIONS OF THE UNITED STATES BOARD OF PAROLE, at 2, (Jul. 1964).
25. 18 U.S.C. 4202-4208.

(b) Youth Offenders committed under the provisions of the Federal Youth Corrections Act

(c) Juvenile delinquents committed under juvenile procedure in United States Courts. The parole procedures and periods of eligibility are outlined in the respective statutes governing each group.[26] It is the second of these three groups that is of present interest, namely, the committed youthful offenders.

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26. For varying parole procedures see: 18 U.S.C. 4202, 4208(a), and 4208(b).

CHAPTER III

THE FEDERAL YOUTH CORRECTIONS ACT

A. General

The preceding sections have indicated the evolution of penology as it progressed through various stages ranging from pure vengeance to punishments for expiation and deterrance. More recently the emphasis has been towards rehabilitation or correctional treatment. In this respect the most current effort to provide subjective correctional treatment of convicted federal offenders if the Federal Youth Corrections Act. This Act created the Federal Youth Correction Division within the United States Board of Parole and thereby established a new system of sentencing and handling of prisoners hitherto treated as adult inmates.[27] The Act was signed into law on September 30, 1950, however it did not come into actual use until January 19, 1954, when the then Attorney General declared that there were facilities available to receive commitments.[28] By statute, the Attorney General is charged with the responsibility of designating members of the Board of Parole to serve on the Youth Corrections Division as the work requires and to also designate one of the

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27. 64 Stat. 1085 (Sep. 30, 1950) as amended, 66 Stat. 46 (Apr. 18, 1952).
28. Address by Mr. George J. Reed, Chairman, Youth Corrections Division, U.S. Board of Parole, at Judicial Conference of the Fourth Circuit, Jul. 7, 1956.

members to serve as chairman with appropriate delegated authority to carry out his responsibilities.[29]

Prior to enactment of the Youth Corrections Act only two judicial procedures and sentencing categories existed. If the federal offender had not attained the age of eighteen years he may have been prosecuted and sentenced under the Juvenile Delinquency Act. The other alternative for juveniles and all other offenders regardless of age was to be prosecuted and sentenced as an adult. The Federal Youth Corrections Act expanded the criminal courts sentencing authority by providing an alternate method of sentencing, treatment and parole of youths who are under twenty-two years of age at time of conviction.[30] Although the Youth Corrections Act was not amended another statute in 1958 provided that in the case of a defendant who has attained his twenty-second birthday but not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there is reasonable grounds to believe that the defendant will benefit from the treatment provided under the Youth Corrections Act, sentence may be imposed pursuant to the

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29. 18 U.S.C. 5005.
30. 18 U.S.C. 5006(e).

provisions of that Act.[31] Accordingly, the Youth Corrections Act may be applied in cases of convicted persons up to twenty-six years of age. This additional group is referred to as "young adult offenders."

B. Purpose

To say that the Youth Corrections Act provides the criminal court judge with an alternate system of sentencing, treatment and parole of youthful offenders is an accurate statement. However, the purpose of this Act is well defined by several court opinions. The purpose of Congress in passing the Act was to make available for the discretionary use of federal judges a system for the sentencing and treatment of youth offenders by permitting the substitution of correctional rehabilitation rather than retributive punishment.[32] In this respect, the objective of the purpose in applying this system is the eventual rehabilitation of youthful offenders which is in accord with modern trends in penology which accentuate rehabilitation rather than punishment.[33] However, the Act was not intended to be applied arbitrarily to all youth offender cases but rather to attempt rehabilitation of youths

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31. 18 U.S.C. 4209. However, a person between the ages of 22 and 26 cannot be committed pursuant to the Youth Corrections Act if he is convicted of an offense which there is a statutory minimum penalty. 28 U.S.C. 334.
32. United States v. Reef, D.C. Colo., 268 F. Supp. 1015 (1967).
33. Briscoe v. United States, D.C. Del., 246 F. Supp. 818 (1965), aff'd 368 F. 2d 214.

regularly convicted of crime who show promise of becoming useful citizens.[34]

C. Sentencing

The Youth Corrections Act does not provide for a particular type of trial procedure as do State and Federal Juvenile Delinquency Acts. The accused is prosecuted as any adult offender and the discretion of the Court whether to apply the provisions of the Youth Corrections Act only arises after conviction. "Conviction" is defined as the judgment on a verdict of finding of guilty, a plea of guilty, or a plea of nolo contendere.[35]

Upon conviction the court may exercise in its discretion any of five sentencing alternatives under the Act. They are:

(1) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(2) If the court finds that the youth offender has been convicted of an offense punishable by imprisonment, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to the Act until discharged by the Youth Division.

(3) If the court finds that the youth offender may not be

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34. White v. Reid, D.C. D.C., 126 F. Supp. 867 (1954).
35. 18 U.S.C. 5006(h).

able to derive the maximum benefit from treatment by the Division prior to the expiration of six years from date of conviction he may sentence the youth offender to the custody of the Attorney General for treatment and supervision for any further period that may be authorized by law for the offense or offenses for which he was convicted or until discharged by the Division.

(4) If the court finds that the youth offender shall not derive benefit from treatment under (2) or (3) above the court may sentence under any other applicable penalty provision.

(5) In the event the court is undecided and desires additional information as to whether a youth offender will derive benefit from treatment under (2) or (3) above, it may order that the youth offender be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. The Youth Division shall report within sixty-days from the date of the order its findings and recommendations to the court. The court will then decide on an appropriate sentence.[36]

The following tables illustrate the current trends and proportions in the use of the Federal Youth Corrections Act by the Federal Courts. It is interesting to note the increasing number of "commitments for study" prior to sentencing. This marked

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36. 18 U.S.C. 5010.

increase may be interpreted to reflect the courts growing awareness that proper screening and evaluation of each individual offender is essential in determining an appropriate sentence.

TABLE I

Number Youth Offenders Committed and Number Committed for Study Prior to Sentencing. Fiscal years 1962 to 1966.

Year	Commitments for Treatment (Sec. 5010(b) or (c))	Commitments for Study (Sec. 5010(e))
1962	1,182	92
1963	1,237	151
1964	1,149	184
1965	1,131	221
1966	1,132	224

The application of the Federal Youth Corrections Act in proportion to the overall number of persons sentenced is illustrated by the next table.

TABLE II

Commitments under Regular Adult Sentencing and under the Youth Corrections Act, Prisoners between ages 18 and 22 only. Fiscal years 1962 to 1966.

Year	Sentenced under Adult Statutes	Sentenced under Youth Act	Percent Sentenced under Youth Act
1962	1,004	915	47.7
1963	918	979	51.6
1964	952	910	48.9
1965	914	862	48.5
1966	926	871	48.5

The statistics indicate that approximately one half of persons found guilty between the ages 18 and 22 were sentenced under the Youth Corrections Act. In addition to the above figures, there were 253 commitments under the Youth Act in 1966 of persons between the ages 22 to 26 who were declared young adult offenders.[37] These tables clearly show that the Act is being applied by the courts and it has assumed an integral role within modern day systems of penology.

D. Legal Issues

The sentencing provisions of the Youth Corrections Act appear clear and unambiguous. Nevertheless, litigation as to its constitutionality and application has resulted. The six year

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37. DEPARTMENT OF JUSTICE, ANNUAL REPORT THE UNITED STATES BOARD OF PAROLE, at 21, (Nov. 1966).

period of commitment under the Act for all convictions including misdemeanors and other offenses regularly punishable by lesser periods of confinement was challenged as unconstitutional as a deprivation of due process. A typical case is one that concerned the theft of a radio of a value of less than $100.00 on a Government reservation which was a misdemeanor providing for a maximum sentence of one year confinement but the defendant was committed under the F.Y.C.A. thereby subjecting him to a six year term. His allegation of unconstitutionality was not accepted by the court and the increased sentencing authority possible under the Act has been repeatedly upheld.[38]

Defendants have even argued that once they have been sentenced, the subsequent act of a court in vacating their sentences and re-sentencing them under the Act constitutes double jeopardy. Similar argumentation was raised by a defendant who was placed on probation by the court and later the probation was revoked and sentence imposed under the Act. The courts have held that such re-sentencing is not double jeopardy.[39]

Although the Federal Youth Corrections Act does not provide for any specific requirement that a defendant be advised of the

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38. Cunningham v. United States, 256 F. 2d 467 (5th Cir. 1958).
Eller v. United States, 327 F. 2d 639 (9th Cir. 1964).
Rogers v. United States, 326 F. 2d 56 (10th Cir. 1963).
39. Freeman v. United States, 350 F. 2d 940 (9th Cir. 1965).
Cherry v. United States, 299 F. 2d 325 (9th Cir. 1962).

possible imposition of greater sentence under the Act than would the crime otherwise provide, the courts have established the requirement that a defendant who pleads guilty and is a youthful offender must be advised that his plea of guilty to an offense punishable by a sentence of less than six years confinement may result in a possible commitment under the Act of up to six years. The warning is aimed at providing the defendant the knowledge that he may be sentenced to a longer period of confinement under the Act than the offense generally provides for. By so advising the defendant upon a plea of guilty, he has the opportunity to withdraw his plea. Such warning avoids litigation over issues whether the plea of guilty was voluntarily made and done so with proper understanding of its possible consequences.[40] This warning requirement applies to guilty plea cases and should not be confused with the courts authority to commit a youthful offender under the Act without his consent.[41]

E. Classification, Placement and Treatment

Persons committed under the Youth Corrections Act are sent to a classification center. These centers make a complete study of each youth offender including a mental and physical examination, to ascertain personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or

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40. Johnson v. United States, 374 F. 2d 966 (4th Cir. 1967). Pilkington v. United States, 315 F. 2d 204 (4th Cir. 1963).
41. Briscoe v. United States, 368 F. 2d 214 (3d Cir. 1966).

criminal experience, and any mental or physical defect or other factor contributing to his delinquency. Such studies are in the absence of exceptional circumstances completed within thirty days. The classification center then forwards to the Director, Bureau of Prisons and to the Youth Division, U.S. Board of Parole a report of its findings and recommendations as to the appropriate treatment needed in each case.[42]

The Director, Bureau of Prisons, upon receipt of the findings and recommendations of the classification agency and the recommendations of the Youth Correction Division has the responsibility to decide what course of action should be taken in each case. The Director may exercise the following powers:

(1) Recommend to the Youth Division that the committed youth offender be released conditionally under supervision; or

(2) Allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or

(3) Order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

The Director, Bureau of Prisons, may also transfer at any time a committed youth offender from one agency or institution to any other agency or institution.[43]

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42. 18 U.S.C. 5014.
43. 18 U.S.C. 5015.

Youthful offenders who are committed for treatment undergo such care in institutions of maximum security, medium security, or minimum security as required by their conduct, including training schools, hospitals, farms, forestry and other camps and other agencies that will provide the essential varieties of treatment. The Director, Bureau of Prisons, has the duty to set aside, designate and even adapt institutions under the control of the Department of Justice for the treatment of youthful offenders. In so far as practicable, such institutions are supposed to be used only for the treatment of committed youth offenders and even these offenders should be segregated according to their needs for treatment.[44]

Although the Youth Corrections Act urges the utilization of institutions for the exclusive treatment of committed youthful offenders, the Bureau of Prisons does not operate institutions exclusively for offenders committed under the Youth Corrections Act. Such commitments are generally made to "youth institutions." These institutions also contain persons committed under the Federal Juvenile Delinquency Act and persons between the ages of 22 and 26, sentenced as "young adult offenders" under the statute previously discussed. In addition to specific correctional training in these youth institutions, emphasis is placed on vocational training, academic education, and individual and group

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44. 18 U.S.C. 5011.

counseling. Psychiatric and psychological treatment is also provided on a limited basis.[45]

If facilities are not available within the jurisdiction of the Federal Government, the Director, Bureau of Prisons, may contract with any public or private agency not under his control for the custody, care, subsistence, education, treatment, and training of committed youth offenders the cost of which may be paid from the appropriation for the "Support of United States Prisoners".[46]

F. Release of Youthful Offenders

Committed youth offenders are periodically examined and reexamined as directed by the Director, Bureau of Prisons. Reports of such examinations as required are forwarded to the Youth Correction Division.[47] The Youth Division conducts subsequent review hearings following the initial hearing as scheduled by the Division. In some cases, the Youth Division may in its discretion substitute institutional progress reports for one or more of the personal

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45. Letter from: Myrl E. Alexander, Director, Bureau of Prisons, Wash., D.C., to Major Steven Chucala, Oct. 21, 1968. Mr. Alexander also noted that Youth Corrections Act offenders are generally committed to: The Federal Reformatory, Petersburg, Virginia; the Federal Correctional Institution, Tallahassee, Florida; the Federal Reformatory, El Reno, Oklahoma; the Federal Youth Center, Ashland, Kentucky; the Federal Correctional Institution, Milan, Michigan; the Federal Correctional Institution, Seagoville, Texas; the Federal Youth Center, Englewood, Colorado; and the Federal Correctional Institution, Lompoc, California.
46. 18 U.S.C. 5013.
47. 18 U.S.C. 5016.

interviews.[48]

Committed youth offenders may be released under several different methods by the Youth Division. Before explaining these methods it is appropriate to note that a committed youth offender does not receive the benefit of adult prisoners who may shorten their period of confinement even in the absence of parole by mandatory release through schedules of "good time credits" which automatically shorten their prison sentences.[49] Another significant area of difference is that committed youth offenders do not apply for parole nor can they waive a hearing whereas adult prisoners may apply for parole by executing a proper form and may waive hearings before a member of the Board of Parole.[50]

Youth offenders under the Act may be released as follows:

(1) The Youth Division may at any time after reasonable notice to the Director, Bureau of Prisons, release conditionally under supervision.

(2) The Youth Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

(3) A youth offender committed under the normal six-year term shall be released conditionally under supervision on or before

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48. Supra note 24, at 7.
49. 18 U.S.C. 4163.
50. DEPARTMENT OF JUSTICE, RULES OF THE UNITED STATES BOARD OF PAROLE, at 8, (Jul. 1965).

the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction. This means a possible maximum of four years confinement and two years parole under conditional supervision.

(4) A youth offender sentenced under the more than six year section, namely (5010(b)) of Title 18 U.S.C., shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may then be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. Otherwise, the youth offender shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed without interruption from the date of conviction.[51]

G. General Parole Policy

The Youth Corrections Act spells out the authority under which a committed youthful offender may be paroled and released; however, this Act and even the Parole Act for adults[52] does not specify how the U.S. Board of Parole is to reach its decisions aside from declaring "in its discretion". The Rules of the U.S. Board of Parole, effective July 1, 1965, have filled in this void by establishing a general policy that parole will be granted when,

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51. 18 U.S.C. 5017.
52. 18 U.S.C. 4203.

in the judgment of the Board, an eligible prisoner will avoid further violation of law and when the factors which will affect him and his dependents upon release, assure adequate public security. To arrive at a just determination the Board welcomes information of a material nature which may be of assistance. Each Board member has the opportunity to review each case and parole will not be granted or denied until a summary of the facts of such case and an opinion or recommendation as to the appropriate action suggested have been prepared by the interviewing member, and until a quorum of the Board has had an opportunity to review the prisoner's file, the member's summary and his recommendations. Additionally, all pertinent data accumulated is also considered.

In cases of adult prisoners, decisions and orders will be based upon an agreement of three members out of a voting quorum of five members of the Board. In committed youthful offender and juvenile cases, decisions and orders are based upon an agreement of two members out of a voting quorum of three. In this respect, any member of the Board may be called upon to constitute a quorum for voting purposes on any type case. Therefore, a decision relevant to a committed youthful offender may be the result of vote by Board members who are not members of the Youth Correction Division.[53]

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53. Supra note 50, at 12-13, 46-47.

By statute the Youth Correction Division may revoke or modify any of its previous orders respecting committed youth offenders except an order of unconditional discharge.[54]

H. Supervision and Apprehension of Released Youth Offenders

Released youth offenders who are permitted to remain at liberty under supervision or conditionally released are under the supervision of United States probation officers, supervisory agents appointed by the Attorney General, and voluntary supervisory agents approved by the Youth Division who serve without compensation. The Youth Division limits and defines by regulations the authority of said volunteer supervisory agents or organizations.[55] However, no volunteer supervisory agents or organizations are currently utilized by the Youth Division.[56]

While released youth offenders are on parole and before they are unconditionally discharged periodic reports are submitted by the United States probation officers and supervisory agents to the Youth Division respecting the youth offenders under their supervision.[57] If at any time before the unconditional discharge of a committed youth offender, the Youth Division is of the opinion that such offender will be benefited by further treatment in an

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54. 18 U.S.C. 5018.
55. 18 U.S.C. 5019.
56. Interview with Claude S. Nock, Jr., Youth Division Executive, U.S. Board of Parole, Wash. D.C., in Wash. D.C., 7 Jan. 1969.
57. 18 U.S.C. 5016, also Supra note 50, at 51.

institution or other facility any member of the Youth Division may direct his return to custody or if necessary may issue a warrant for his apprehension and return to custody. The warrant may be executed by a United States probation officer, an appointed supervisory agent, a United States Marshall, or any officer of a Federal penal or correctional institution. The warrant for apprehension serves the purpose of re-exercising custody over the youth offender. He is given the opportunity to appear before the Youth Division or a member thereof to consider any and all matters in his case. The Youth Division may then or at its discretion revoke the order of conditional release.[58]

The youth offender under the F.Y.C.A. who has his parole revoked receives a benefit which a person sentenced as an adult does not enjoy. This benefit accrues from the fact that generally time spent on parole by adult offenders is not credited towards service of a sentence when parole is revoked.[59] However, a committed youth offender serving a six-year committment cannot be held more than six years from the date of his conviction, and so, in effect receives credit for time spent on parole even though his parole may have been revoked.[60] Additionally, should a paroled youth offender commit an offense and be convicted by a state court

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58. 18 U.S.C. 5020.
59. 18 U.S.C. 4205.
60. Fish v. United States, D.C. Md., 254 F. Supp. 906 (1966).

which sentences him to confinement, the service of his Federal sentence continues to run and it is not tolled. A detainer may be filed so that he will be returned to Federal control if there remains any portion of his youth corrections sentence after release by state authorities.[61]

I. Parole-Adjustment and Failure

The Youth Division in addition to all of its evaluating and judging as to whether a committed youth offender has sufficiently adjusted to assume a responsible and lawful place in society even requires the formulation of a "plan for community living" on each prisoner before it will grant parole. The purpose of this plan is to set up prior to parole an approved schematic of the environment that the parolee will live in. This covers such matters as his place of residency and whether a bona-fide job offer exists. The confinement institution and the United States Probation Officer in the locality of intended residency assist the youth offender in formulating this plan and after it is approved by the Youth Division a release certificate is issued. Planning for such youths is often extremely difficult because of little or no family assistance. The youth may have to live alone and be self sustaining. To further assist these youth offenders who must live

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61. Interview with Ziegel W. Neff, Chairman, Youth Corrections Division, U.S. Board of Parole, Wash. D.C., in Wash. D.C., 7 Jan. 1969.

alone and be self sustaining, the youth may be placed in a pre-release guidance center for a period of from one to three months. Here the youth goes to work in private employment during the day and lives at the center during the evenings. This system provides a transitional base permitting the youth to adjust and develop confidence in himself.[62]

Although considerable effort and hope of success is involved in each case, incidents of violation of parole conditions necessitating the issuance of warrants for retaking of youth offenders occur with substantial frequency. For example, in 1966, 1,727 youths were released under the Youth Corrections Act. That same year the Youth Division had to issue 960 warrants for retaking of youth offenders. The Youth Division however does not appear to consider its program a failure because of these violations and meritoriously states:

> "This age group is prone to criminal behavior and tends to be nomadic and without close family ties. There is little meaningful employment history, and formal education generally has been cut short. It is expected, then, that this group will often violate the conditions of their release. It is for this very reason that an indeterminate sentence, with an opportunity for return for further treatment, is valuable for this group of youth offenders."[63]

The following table of facts tends to indicate the relative success of youth offenders when paroled. The table covers a three year period for each fiscal year cited and therefore it is actually

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62. Supra note 37, at 22-23.
63. Id. at 24.

as of fiscal year 1966 even though the last parole year noted is 1963.[64]

TABLE III

Percent of Youth Offender Parolees Against Whom No Warrant was Issued Prior to End of Third Year after Year of Release, fiscal years 1955 to 1963.

Year of Release on Parole	Number Released	Percent against Whom No Warrant was Issued
1955	40	37.5
1956	186	47.3
1957	334	38.9
1958	463	45.1
1959	736	48.2
1960	998	48.3
1961	1,223	45.9
1962	1,701	48.6
1963	1,559	47.9

J. Setting Aside of Conviction

In addition to providing specialized treatment and particular benefits as mentioned earlier the Federal Youth Corrections Act provides for the setting aside of a conviction under certain conditions. The conditions are plain and simple to understand. With

64. Id. at 25.

proper guidance and understanding the youth offender can appreciate the opportunity that this Act affords him and thereby can result in a plus factor towards his motivation to undergo corrective treatment and have reasonable expectation of seeing his conviction set aside. A certificate setting aside conviction may be achieved upon the unconditional discharge by the Youth Division of a committed youth offender before the expiration of the maximum sentence imposed upon him. In such a case the conviction is automatically set aside and the Youth Division issues to the youth offender a certificate to that effect.[65] A similar order is sent to the District Court which sentenced the youth so that the Court's records may be amended.

The Youth Division set aside the convictions of 398 youth offenders in fiscal year 1966, 361 in 1965, and 413 in 1964. In a few instances, the Youth Division may authorize the termination of active supervision without granting an unconditional discharge. In such cases the youth does not receive a set aside of his conviction and supervision may be reinstated if necessary. This procedure is used where a youth does not merit a setting aside of his conviction but no further value can be achieved by parole supervision.[66]

The Act also provides for similar relief where a youth offender is placed on probation by the court, the court may thereafter,

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65. 18 U.S.C. 5021.
66. Supra note 37, at 26.

in its discretion, unconditionally discharge the youth offender from probation prior to the expiration of the maximum period of probation fixed by the court, which discharge automatically sets aside the conviction. The court then issues to the youth offender a certificate setting aside his conviction.[67]

K. Commentary on the Youth Corrections Act

Mr. Ziegel W. Neff, Chairman of the Youth Correction Division, United States Board of Parole, is a firm believer in the merits and success of the Youth Correction Program. He attributes much of this success upon the Parole Board and the Youth Correction Division's constant cooperation and communication between their agency and the Bureau of Prisons, the Federal Courts and the youth institutions. The close relationship that these agencies have had is essential to insure the most effective way of treating youthful offenders and also providing for the best possible means of determining the earliest feasible release of the youth back to community life.

Mr. Neff expects that in the future his Division may have the assistance of computer techniques and other scientific advances. However, he quickly adds that human factors for success or failure exist for which machines may never be able to adequately measure. When asked if parole boards should be decentralized and made part

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67. 18 U.S.C. 5021.

of individual correctional institutions, Mr. Neff maintained that,

> "While parole boards should have a close liaison with the administrators of correctional institutions they should not be part of the correction system itself. This was tried in the past with unfavorable results. Further, should this responsibility be placed with widely dispersed local administrators, we would turn back the clock to the old days when wardens made the determination of freedom or continued incarceration. We do not want, in the name of advanced technology, to find ourselves coming out of the same door wherein we enterred."

Mr. Neff was asked to comment about actions that appear reasonably necessary to improve the Youth Corrections Act Program. He indicated that he and other members of the Division feel that persons convicted of misdemeanor type offenses (punishable by imprisonment up to one year), unless convicted of multiple misdemeanors should not be sentenced under the Federal Youth Corrections Act because it provides for a six year sentence. This longer sentence, although legally acceptable, tends to cause a poor attitude on the part of the committed youth and makes corrective rehabilitation, orientation and proper motivation in the youth terribly difficult, if not impossible. In fact it tends to work against the rehabilitation system from the start. Therefore, persons convicted of a single misdemeanor should be sentenced under existing adult statutes rather than the prolonged sentence of the Youth Act. The Chairman also desires an amendment to the present six year term of sentence which is a four year confinement followed by two years of parole. Based upon experience the majority of committed youths are convicted of violation of the

Dyer Act which is punishable by a maximum of five years confinement. The average time spent in actual confinement by committed youth offenders is approximately eighteen months. Therefore, the maximum sentence under the Act should be lowered to five years which would mean three years of imprisonment and two years parole. Mr. Neff stated, that action is presently being taken to seek amendment of the Act based upon the two points noted above.

The Chairman concluded by describing an experience which occured to him after attending a group counseling session at the Probation Offices in the Federal Courts Building, Washington, D.C.. After the session had ended and he was walking along a corridor to leave the building, one of the participants caught up to him and said,

> "Judge, I thought maybe you would like to know something. A lot of people cry about the Youth Act. I just want you to know that it completely changed my life. When I was sentenced to Lorton under the Act, I was bitter like a lot of the rest but I went to work anyway and learned a trade. I learned how to be a barber. Before, I didn't know how to do anything to earn a living. Now I am married and have two fine children. I am happy and I am happy I got that Youth Act."[68]

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68. Supra note 61.

CHAPTER IV

UNITED STATES MILITARY JUSTICE

A. General

The Federal Youth Corrections Act program was outlined in detail in the last chapter. Basically, it can be broken down into four distinct but inter-related areas. They are, sentencing, treatment, release, and possible set aside of conviction. This chapter will be devoted to an outline of what the United States Army judicial and confinement systems afford sentenced prisoners in respect to the four aforementioned areas outlined above under the Youth Act.

The American military justice system is the oldest judicial system of the United States of America. This came about because the English military tribunal system was transplanted in America prior to the Revolution and it was adopted by the Continental Congress, in the first American Articles of War of 1775. The Military Court Martial was continued by subsequent Acts of Congress and in reality is older than the Constitution and any of the courts that were created therefrom.[69] Numerous amendments were made to the Articles of War until Congress enacted the Uniform Code of Military Justice in an effort to unify, consolidate and revise the Articles

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69. W. WINTHROP, MILITARY LAW AND PRECEDENTS, at 47, (2d ed. 1920).

of War.[70] To implement the Uniform Code of Military Justice, President Harry S. Truman promulgated the Manual for Courts-Martial, 1951.[71] More recently, President Lyndon B. Johnson signed into law a new and revised version of the Manual for Courts-Martial, United States, 1969.[72] Additionally, the President also signed into law the Military Justice Act of 1968[73] which amends in part the Uniform Code of Military Justice.

B. Sentencing

Although these actions were intended to modernize military criminal law there has not been nor is there at present a system within the military which provides for the treatment of military youthful offenders as previously described under the Federal Youth Corrections Act. To begin with, sentencing is still the function of the court-members and under the new law, the military judge will do so if the accused requests to be tried before a judge only. The military court upon a finding of guilt has the choice of certain enumerated punishments within prescribed limits depending upon the court's authority, the accused's status and the limits set by the table of maximum punishments. The court has no authority to require that some professional agency evaluate the convicted offender and report its findings and

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70. 64 Stat. 107, (May 5, 1950).
71. Exec. Order No. 10214, 3 CFR 408-731.
72. Exec. Order No. 11430, Sep. 1968, 33 Fed. Reg. 180 (1968).
73. 10 U.S.C., Chap. 47.

recommendations as to proper disposition so that an intelligent and appropriate sentence may be imposed. There is no provision for differential sentencing in the discretion of the court according to age and individual needs. All accused are tried and sentenced alike under one system.

Military courts may not request a pre-sentencing investigation report, place a prisoner on probation, order suspension of punishment, sentence to an indeterminate sentence or to a split sentence. Although many brethren of the military legal profession like to refer to General Courts-Martial as being on the same level as Federal District Courts, the limited authority of the military judge and the court's as to sentencing and procedure is enough to rebut this illusion. In reality, the military court must reach a sentence based upon such factors as the type of crime that was committed, the possible testimony of character witnesses if available, rebuttal character witnesses if available, the possible sworn or unsworn statement of the accused or statement through his counsel, the service record of the accused if entered into evidence and this may be of little value if he is on his initial tour of duty, the extremely limited facts contained on the "Personal Data Sheet" such as the number of years of service, the pay and allowances, date of commencement of the current tour of service, and period of pre-trial confinement if any. A statement of previous courts-martial convictions is also admissable

providing said convictions have been finally approved and the conviction(s) were within a six-year period from the date of commission of the offense presently convicted.[74]

Aside from lacking adequate knowledge of the accused, military courts are not generally aware of what confinement facilities are capable of accomplishing for the individual they may sentence to confinement. In some cases court members are not even sure where a prisoner sentenced to confinement will be incarcerated. It has been the author's experience that some court members feel that no matter what sentence they adjudge, the convening authority will modify it or that there exists some sort of "deal" between the accused and the convening authority which makes their sincere efforts at sentencing a moot point. These suspicions on the part of court members are not pure conjecture. During the calendar years 1965 and 1966, the Army tried three thousand twenty-nine accused by general courts-martial. Of those cases, two thousand forty-two or 67.4 percent, were based on pleas of guilty. Of the cases in which guilty pleas were entered, one thousand six hundred and thirty-four, or 80.01 percent of the pleas, were entered pursuant to a pretrial agreement, thus rendering the court's sentence in those cases a nullity.[75]

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74. Manual for Courts-Martial, United States, 1969, para. 75b(2).
75. Statistics furnished by the Records Control and Analysis Branch, U.S. Army Judiciary, Washington, D.C..

The United States Court of Military Appeals has stated that: "The modern philosophy of penology is that punishment should fit both the offender and the crime."[76] This declaration was made in a case in which the accused challenged the propriety of the Staff Judge Advocate's inclusion of certain juvenile delinquencies by the accused in his post-trial review to the convening authority. The court went on to say:

> "In order intelligently to assess an appropriate sentence and to serve the military community properly, it is necessary that the convening authority be furnished with information on the life of the accused, his background, and his family, his early training, his capacity to conform to norms of society, his military record, his mental capabilities, his rehabilitation potential, his value and many other items touching on his character and behavior."

After reading this brief and concise outline by the highest court of the United States Armed Forces as to what should be considered in deciding an appropriate sentence, one can not avoid asking himself, is it not the function of the trial court to sentence and therefore should not this information be presented to the court rather than the convening authority? Is it not strange that the trial court appears to be sentencing an offender without benefit of adequate knowledge? Is it any wonder that members of courts-martial question the value of their efforts in sentencing when a person outside the court-room knows more about the accused

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76. United States v. Barrow, 9 U.S.C.M.A. 343, 26 C.M.R. 123 (1958).

for sentencing purposes than they and he will ultimately decide what is an appropriate sentence without benefit of the rationale of compromises and discussions that occured in closed session among the members of the court? One may even ask himself, why waste the court's time in sentencing when the convening authority appears to be in a more favorable position to pass sentence? To consider these questions would require an effort almost the equivalent of another thesis paper. However, the adoption of a system similar to the Federal Youth Corrections Act would certainly cure or do away with the majority of these short-comings.

The hiatus of knowledge by military courts as to adequate information upon which to determine an intelligent and appropriate sentence in each case is compounded further in the trial of special and summary courts-martial, where the practice has been to have no certified military counsel performing the duties of a judge and rarely those of counsel. The United States Army has tried thousands of cases before courts-martial composed entirely of lay personnel. These courts being under the control of lay officers and being the majority before which Army accused have been exposed appear to have established the image of what military justice is. Suffice it to say that, in the author's opinion it is not a favorable impression which eventually casts its reflection upon the certified attorney. The overwhelming control of the courts-martial system by lay officers does not appear to have enhanced the stature of

the military judicial process nor that of the military attorney. Accordingly, steps are being taken to rectify in sum measure these situations. The latest action towards this end is the enactment of the Military Justice Act of 1968.

C. Treatment of Military Offenders

Since the military courts-martial has but one system of sentencing regardless of age or whether particular treatment should be ordered for the individual accused, it has no counter-part to the sentencing provisions of the Federal Youth Corrections Act. We will therefore pass onto a review of the objectives and systems of treatment presently available in the United States Army. This will permit some basis of comparison with the Federal Youth Corrections Act.

Although the courts-martial may adjudge a sentence ranging from no punishment to death, depending upon the authority of the court, and the offense committed, if a sentence to confinement is ordered, the prisoner will generally be initially confined at a post stockade. Depending upon the circumstances of each case the prisoner may remain at the initial post stockade, be transferred to the Correctional Training Facility, Fort Riley, Kansas, or to the United States Disciplinary Barracks, Fort Leavenworth, Kansas. In some cases the prisoner may be further transferred from the Disciplinary Barracks to a Federal penitentiary.

The latest military authority establishing policy and

procedures for the treatment of military prisoners is a Department of Defense Instruction dated 7 October 1968. It establishes the principle for all military confinement facilities that, "Discipline should be administered on a corrective rather than a punitive basis, and military correction facilities should be administered on a uniform basis."[77] In addition to establishing general standards of administration of confinement facilities it implements Article 58, of the Uniform Code of Military Justice, by requiring all prisoners sentenced to confinement to be initially confined in military correctional facilities. Prisoners whose sentences as finally approved include confinement for more than one year and who have at least one year remaining to be served upon arrival may be transferred to a Federal penal or correctional institution when the sentence includes dismissal or a punitive discharge and the prisoner is considered to be unfit for further honorable duty. However, this only applies to prisoners convicted of a crime or offense attended by aggravated or reprehensible circumstances or irrespective of the offense of which convicted, if the prisoner's past military, civilian, or confinement record, personality characteristics, or other factors indicate his need for confinement and treatment in a Federal institution. The Instruction further

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77. Dept. of Defense Instruction No. 1325.4, para. IIIA1, (7 Oct. 1968).

provides that a prisoner who is transferred to a Federal penal or correctional institution who is later determined to be of possible future value to the military may be returned to a military confinement facility in preparation for return to military service.[78] The actual procedure followed in transferring a prisoner from military to Federal institutions is to first have him transferred to a disciplinary barracks. The Provost Marshal General, Headquarters, Department of the Army, in coordination with the Federal Bureau of Prisons, Department of Justice, then determine the appropriate place of his confinement.[79] Military prisoners transferred to Federal penal or correctional institutions are no longer subject to military regulations and they become subject to the same discipline and treatment including the Federal parole system just as though they were convicted by a civil court.[80]

Sentenced prisoners to confinement that remain under military control may be confined in post stockades. These stockades are responsible for the confinement of pre-trial and sentenced prisoners. Their objectives are to provide an environment which is conducive to the correction of military prisoners, to return to duty the maximum number of soldiers with improved attitudes and

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78. Id. at para. III 1.
79. Army Reg. No. 633-5, para. 6 (8 Jul. 1965).
80. For some cases in this area see Jones v. Looney, D.C. Mich., 107 F. Supp. 624 (1952), O'Callahan v. Attorney General of the United States, D.C. Mass., 230 F. Supp. 766, aff'd 338 F. 2d 989.

motivation, to identify promptly and expeditiously release from confinement, through separation from the service or transfer to the disciplinary barracks, prisoners who will not respond or are incapable of responding to correctional treatment or discipline.[81] Each stockade is required to establish a correctional treatment program which is aimed at showing the prisoner he has committed a wrong and with the aid of correctional treatment, redirect or correct his behavior. This is to be accomplished by professional evaluation, counseling, training, useful employment and welfare activities. Individual correctional files are kept and professional services support is provided by the Post Chaplain, Staff Judge Advocate, Surgeon, Officers of the Mental Hygiene Consultation Service, including psychiatrists, psychologists and sociologists.[82] Although the objectives and program described above for correctional treatment are meritorious it appears that such programs have not achieved the desired goals envisioned. This may have been due to the lack of qualified personnel, overcrowding of facilities and poor morale on the part of prisoner guard personnel.[83]

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81. Army Reg. No. 190-2, para. 4 (9 Oct. 1967).
82. Id. at Chaps. 3 & 6.
83. For example, the situation described existed at the Post Stockade, Fort George G. Meade, Maryland, in late 1965. The facility was built to house approximately 176 prisoners however there were periods when 240 or so were squashed together. Due to the lack of prison personnel, post units were required to detail groups of their personnel for 30 day tours as prisoner guards. Those detailed were generally the most expendable from each unit

D. Correctional Training Facility

The need for a specialized correctional facility to provide the proper treatments under proper environment and to alleviate the short-comings of post stockades was apparently widespread. For, in July of 1968, a United States Army Correctional Training Facility was established at Fort Riley, Kansas. The mission of this institution is, "To provide the intensive training, close custodial supervision, and that correctional treatment necessary to return military prisoners to duty as well trained soldiers with improved attitudes and motivation."[84] This correctional facility will accept prisoners convicted of military offenses only, who have 90 days or more on sentences remaining upon arrival. The Army Regulation concerned does not specifically prohibit receipt of prisoners who have been adjudged a punitive discharge but based upon the overall intent of the program it is assumed that they are not eligible to receive this treatment since

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and such duty was looked upon with disfavor. The prisoner guard morale rate became so poor and prisoner escapes so frequent that this author, as the Post Staff Judge Advocate, was appointed by the Post Commander to investigate the situation and make constructive recommendations. With due respect to the sincere efforts of some stockade personnel, the conditions were more conducive to escaping from the facility than providing improved attitudes and motivation to the inmates. Additionally, the confinement officer was performing his office as an "additional duty". It clearly appeared that being the officer in charge of such a confinement facility was a full time job in and of itself.

84. Army Reg. No. 190-19, para. 4 (30 Sep. 1968).

prisoners for whom an administrative discharge under Army Regulation 635-212, has been approved are not eligible.[85]

Those prisoners who are selected to receive treatment at this facility upon arrival, receive initial processing, evaluation and interviews by Personnel, Logistical, and Professional Services support representatives. Treatment files are opened on each prisoner and based upon thorough evaluation the individual is placed within a correctional training unit composed of prisoners having relative similarity to his needs concerning correctional treatment, custody, and control. A treatment plan is created for each prisoner and weekly progress reports are entered therein to permit changes of treatment where necessary. This program is aimed at achieving correction through constant and continuous supervision. Training includes such subjects as military justice, first aid, CBR warfare, map reading, guard duty, individual weapons, close combat, infiltration course, marches, tactical training and other type military courses.[86] The prisoner is oriented towards military life and discipline while being trained to be a useful soldier at the same time.

The Correctional Training Facility has been receiving approximately 200 prisoners per week since opening in July 1968. The typical prisoner is 19 or 20 years old, a high school drop out and

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85. Id. at para. 6.
86. Id. at para. 8.

frequently a product of a broken home. Most have been convicted by special courts-martial for one or more unauthorized absences. Considerable effort is made by the staff to treat each prisoner as an individual and to assist him if necessary in solving financial or similar problems. The normal stay of the prisoner is nine weeks and the commander has the authority to shorten this stay by way of remission or suspension of the sentence being served or he can lengthen the stay by recycling. Due to the short period of time that this program has been in existence, meaningful statistics as to its success are not available.[87]

E. United States Disciplinary Barracks

The highest echelon of confinement facility within the armed forces is the disciplinary barracks. Its mission is to provide the correctional treatment and training, care and custodial supervision necessary to return military prisoners to duty as effective soldiers or to civilian life as useful citizens, with improved attitudes and motivation.[88] In performing this mission the disciplinary barracks has certain objectives to meet. In addition to providing a secure facility in which the prisoner may find a conducive environment to correction, prisoners whose sentence include a

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87. Address by LTC. Phillip G. Meengs, Staff Judge Advocate, U.S. Army Correctional Training Facility, Fort Riley, Kansas, at the Army Judge Advocate General's Conference, 8 Oct. 1968.
88. Army Reg. No. 210-170, para. 5.1 (Change No. 6, 14 Aug. 1968).

punitive discharge are to receive training to develop skills, proficiency, and behaviorial attitudes which equip them for possible restoration to duty or return to civilian life as useful citizens. Additionally, those prisoners who meet the criteria for restoration established by Army Regulation 633-35, are to be promptly identified and recommended for restoration to duty.[89]

Treatment of prisoners begins from the moment of arrival. Newly arrived prisoners are placed in a reception area apart from the main prisoner group. They receive an initial group orientation by an officer who outlines the institutions set-up and programs. Questions by the prisoners are answered in detail. Following completion of the initial processing, the prisoner is assigned to an orientation group for approximately ten days, during which time he is thoroughly indoctrinated in the rules of the institution. Efforts are made to obtain all available information concerning the prisoner to permit proper case study and determination. Even the Federal Bureau of Investigation is often asked to provide information concerning a prisoner's civil criminal record. During the ten day period, the prisoner undergoes numerous lectures on the activities and rules of the institution. Each prisoner is given a complete medical examination and aptitude tests. After release from the reception area, prisoners are kept in either

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89. Id. at para. 5.2.

medium or maximum security custody and given temporary duties inside the institution pending final receipt of field reports, results of psychiatric and medical reports and any other pertinent information.[90]

Prisoners who are identified as having a potential for further military service are provided training specifically designed to prepare them for return to honorable service. This group is generally composed of young prisoners confined for military offenses and represent the greatest challenge due to their lack of motivation for military service and lack of obligations or citizenship. Those who are not considered potentials for further military service are assigned to programs to teach them new skills if necessary and prepare them for return to civilian status. The actual analysis and recommendation as to the type of treatment each prisoner should receive is made by the "assignment board". This is a group appointed by the Commandant of the Disciplinary Barracks. The board consists of not less than five members and may include warrant officers, noncommissioned officers, commissioned officers, and even civilian professional members of the staff.[91]

Depending upon the individual needs of the prisoner as determined by the assignment board there is a wide variety and range

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90. Army Reg. No. 210-170, § II (10 Apr. 1964).
91. Id. at para. 17a(1)(b), for additional information concerning the composition of the board.

of training activities in addition to counseling orientation. Prisoners may attend academic or vocational type classes and for those considered for return to military service their classes are complemented by military training courses. The vocational training courses cover almost every area reasonably permissable within a correctional institution. By regulation alone, there are twenty-nine named courses such as automotive maintenance, gas and electric welding, carpentry, drafting, laundry, sign painting, typing, typewriter repair, masonry, and numerous others. Almost one-half of the courses and all of the above mentioned provide for achieving a Military Occupational Specialty classification therein. Accordingly, the training will be beneficial in civilian life in earning a living or within the military as a recognized and useful capacity.[92] Progress reports are periodically made on each prisoner to permit continued evaluation and necessary changes in assignments when appropriate.

In addition to the assignment board there exists a "disposition board" appointed by the Commandant. This board considers and makes recommendations to the Commandant regarding restoration to honorable duty, clemency, parole and transfer of prisoners.[93]

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92. Id. at §§ X, for a more detailed listing of training activities.
93. Id. at para. 17a(2), for additional information as to the composition of this board.

Abatement of Confinement

Military prisoners are entitled to abatement of confinement for Good Conduct and for Extra Good Time. Briefly, each prisoner who has been sentenced for a definite period of time other than for life, will be credited a certain number of days per month for good conduct. For example, one sentenced to ten years or more will be credited ten days per month abatement. In addition to the good conduct abatements additional days may be earned as extra good time where the prisoner is employed in certain tasks as approved by the Secretary of the Military Department concerned. For example, for the second and subsequent years of confinement, a prisoner may earn up to five days per month abatement.[94]

Pre Release Program

As the sentenced prisoner approaches the completion of his incarceration, either by serving the sentence or parole, a pre-release system is established to prepare him for readjustment to society upon release. Approximately thirty days before release, the prisoner is quartered separately from other prisoners and placed under minimum supervision with added privileges. Group discussion and interview type guidance is generally used to orientate the prisoner to his new environment and responsibilities. Guest speakers, such as Federal Probation Officers, labor counselors

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94. Dept. of Defense Instruction No. 1325.4, para. III O (7 Oct. 1968).

and business representatives are invited to speak. Of course, this latter type orientation is not used for prisoners returning to military duty. Additionally, efforts are made through private industry, the United States Employment Service and similar agencies to secure a suitable employment for the prisoner prior to his release.[95]

F. Some Observations

The objective of military confinement facilities to re-orientate, rehabilitate, train, properly motivate and adjust the prisoner to assume a lawful and useful role in society, whether it be civilian or military, is basically the same as the goals of the Federal Youth Corrections Act. However, the armed forces do not designate any institutions for youth offenders and the need for such is not readily apparent under the present system. There is a difference in that the military does not have an agency like the Federal Bureau of Prisons which in addition to providing overall administration of all Federal penal and correctional institutions determines what facility and what type of correctional program therein is best suited for the individual needs of the prisoner. Additionally, the Bureau may transfer the offender to other institutions as required.

Although the military and Federal goals of treatment appear

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95. Army Reg. No. 210-170, § XII (10 Apr. 1964).

similar, there appears to be some variance in the actual operation of the established programs. Due to overcrowding and other limitations, post stockades have developed a reputation of not being able to accomplish their missions. In some instances commanders lean over backwards to suspend sentences to confinement not because the individual is rehabilitated but simply to make room for new prisoners. Although Army regulations speak of providing worthwhile occupational programs for prisoners, it has been the author's observation at one stockade that much of this occupational training was not truly aimed at developing a military occupational specialty but rather pure manual, unskilled labor such as: cutting timber, chopping logs, cutting grass, unloading and loading trucks, carrying boxes and stocking commissary shelves, performing janitorial services in staff offices of the headquarters, carrying office furniture up and down floors, and in one case, using numerous prisoners both sentenced and unsentenced to dredge the bed of a lake of accumulated silt by shovels after it had been drained. This was done in cold weather while engineer personnel with heavy equipment on the scene stood around smoking cigarettes and simply letting the prisoners"break their backs."

It is not advocated here that military confinement facilities be turned into a "bed of roses". However serious doubt exists and is apparent as to the ability and reasonable expectation of post stockades to be correctional institutions which alter the attitudes

of the inmates and motivate them towards becoming useful military members. This opinion may be supported by the fact that there exists both policy and regulations which prohibit the approval of sentences to confinement of first offenders unless exceptional circumstances exist.

The Correctional Training Facility type institution as established at Fort Riley, Kansas, appears to be a major advance in the treatment of Army prisoners. It is also closer related to the treatment type concepts of the Federal Youth Corrections Program. The treatment provided at the United States Disciplinary Barracks comes even closer to the Youth Correction Program because of its enlarged training program and since it provides for a system of parole.

G. Parole of Military Prisoners

Prisoners confined in post stockades or correctional training facilities are not eligible for parole. These institutions have the limited authority for the granting of "temporary parole" at the discretion of the appropriate commander. This type of release is not to exceed one week and it is meant for brief home visits of an emergency nature. Depending upon the individual prisoner, he may be permitted to travel alone or if necessary under guard.[96] There also exists a classification known as an installation

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96. Army Reg. No. 633-5, para. 34 (8 Jul. 1965).

parolee. This status is based upon the confinement facility personnel determination that the prisoner may be trusted to perform work and live under minimal custodial supervision. The prisoner is required to execute an agreement acknowledging his limitations and responsibilities as an installation parolee. Such prisoners are generally permitted to work outside the stockade facility without custodial supervision but must return to quarters at the stockade which are usually separate from other prisoners and in some cases outside the fenced area of the stockade.[97]

The above two mentioned types of "parole" are not parole in the true sense as exercised under the Federal Youth Corrections Act. The United States Army has a system of parole based upon Federal legislation which permits the Secretary of the Army to provide parole of offenders confined in the United States Disciplinary Barracks.[98] This parole authority is implemented by Departmental Regulations. The Army's parole objective is based on the principle that a period of guidance and supervision in the community is a phase of prisoner rehabilitation. Further, that parole is a means of helping the prisoner make the transition from controlled living in confinement to that of normal life of a community. Should he fail to fulfill his parole obligations, he may be returned to confinement to serve the remainder of his

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97. Army Reg. No. 190-2, para. 28k (9 Oct. 1967).
98. 10 U.S.C. 3663(a).

sentence.[99]

The parole system commences at the disciplinary barracks level where a staff individual is appointed as parole officer by the Commandant. He provides advice, renders assistance in filing requests for parole, prepares and presents cases to the disposition board and performs other functions pertaining to parole.[100]

In order for a prisoner to be eligible for parole the following criteria must first be satisfied:

(1) A prisoner with a punitive discharge of dismissal confined pursuant to a sentence or aggregate sentences of:

(a) More than one year and not more than three years who has served one-third of his term of confinement, but in no case less than six months, will be eligible for parole at that time.

(b) More than three years who has served not less than one year will become eligible for parole consideration at such time as the Clemency and Parole Board may recommend and by the Secretary of the Army's approval, but such time shall not be more than one-third of the sentence or aggregate sentences as lawfully adjudged and approved, or not more than ten years when the sentence is in excess of thirty years.

(c) Good conduct abatement and employment abatement

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99. Army Reg. No. 633-20, para. 1c (19 Jun. 1956).
100. Id. at para. 3.

will be excluded in computing eligibility for parole consideration.

(2) With respect to parole consideration of a sentenced prisoner whose sentence includes confinement and a fine and further confinement if the fine is not paid, eligibility for parole shall be based, in the case of those who fail to pay the fine, on the basic term of confinement plus the additional contingent term which became applicable when the prisoner failed to pay the fine.

(3) Where the sentence includes only a fine and confinement if the fine is not paid, in addition to a punitive discharge, or dismissal in the case of military personnel, they will be eligible for parole consideration after having served six months of the sentence of confinement in lieu of the fine and annually thereafter.

(4) Where one who has been paroled, has had it revoked, consideration for further parole will not ordinarily be available until he has served one year of confinement subsequent to his return unless the Secretary of the Army directs otherwise.[101]

1. Procedure

The requests for parole by eligible prisoners are considered by the Disposition Board of the United States Disciplinary Barracks. The Board makes its recommendations to the Commandant who in turn indicates his opinion as to whether parole should be

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101. Dept. of Defense Instruction No. 1325.4, para. III P2b (7 Oct. 1968).

approved or disapproved. If his recommendation differs from that of the Board's then he must set forth the reasons for his recommendation. The request for parole and allied papers are then forwarded to the Provost Marshal General, Department of the Army.[102] The Provost Marshal General in turn is responsible for maintaining records on each prisoner and for presenting the facts with recommendation in each case of application for parole to the Army and Air Force Clemency and Parole Board.[103] This Board was established to perform several functions one of which is to review parole applications and all available information about the prisoner to include where necessary sources such as relatives of the prisoner, other Federal agencies and even request further information from the prisoner to determine whether release will be in the best interests of the service, society, and the prisoner. The Board is composed of both Army and Air Force personnel and therefore considers clemency and parole of Army and Air Force prisoners. When the Board has completed their review of each file appropriate recommendations are made to the respective Secretary concerning the application for parole.[104]

Where the application for parole is approved by the Secretary of the Army, the Commandant of the Disciplinary Barracks is

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102. Army Reg. No. 633-20, para. 8 (19 Jun. 1956).
103. Army Reg. No. 15-130, para. 4c (2 Jul. 1968).
104. Id. at para. 4f.

advised, however this approval is subject to the satisfactory completion of a parole plan for the prisoner.[105]

2. Commandant's Parole

Since courts-martial convictions in some cases require considerable time before the conviction and sentence can be ordered into execution, there are instances where a prisoner is eligible for parole but may not be considered for such under Army Regulation 633-20, until the order of execution. To cover these prisoners, the Department of the Army has provided for a procedure permitting a "Commandant's Parole".[106] Accordingly, an eligible prisoner for parole will be processed in the manner prescribed for regular parole applicants and upon approval by the Secretary of the Army, release is accomplished when the commandant approves the prisoner's parole plan. The prisoner is required to execute an agreement setting forth the conditions of his parole and that he is on an excess leave status to avoid issues as to entitlements for pay. However, there are instances when the parolee is entitled to receive pay.[107] The prisoner under this type of parole continues to remain under the custody of the Commandant of the disciplinary barracks.

Where upon completion of appellate review the parolee's

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105. Army Reg. No. 633-20, para. 9 (19 Jun. 1956), for information on parole plans see paras. 10 and 11.
106. Army Reg. No. 633-21, para. 1 (6 Oct. 1959).
107. Id. at paras. 2 and 8.

sentence is ordered executed prior to the expiration of his full term, not including credit for abatement, and action has not been taken by the Secretary to remit the remainder of the sentence to confinement, the commandant may order the parolee returned to the disciplinary barracks. The commandant may thereafter effect the prisoner's release on parole in accordance with the provisions of Army Regulation 633-20.[108]

H. Commentary

This in a nut shell is the Army parole system. In some respects it is quite similar to the objectives and practices of the Federal Youth Corrections Act while in others it varies considerably or has no counterpart. Some of the dissimilarities are patently obvious. The Youth Correction Act being an individual type correction system requires that members of its Youth Division keep an eye on the correctional progress of the committed youth offender and to conduct periodic interviews. If they find that the youth is not benefiting then new correctional programs and even transfer of institutions may be recommended. It can be summed up by saying that the Youth Division which exercises discretion as to the ultimate parole and set-aside of conviction authority has its eye on the prisoner from the time of his or her sentencing and in many cases before that, through confinement, parole

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108. Army Reg. No. 633-21, para. 5 (Change No. 1, 13 Oct. 1964).

and until an unconditional release is issued or the entire sentence is served. On the other hand, the Army and Air Force Clemency and Parole Board has no knowledge or possible say in the sentencing, treatment, or confinement of a prisoner. Its authority as to parole applies only to prisoners in the United States Disciplinary Barracks and only when appropriate application for parole is received through the Provost Marshal General of the Army. Accordingly, this military board appears to be somewhat removed from first hand knowledge of the prisoner and its scope of authority is limited in connection to parole, to certain prisoners and to making recommendations of parole to the Secretary concerned.

Aside from the differences mentioned between the Federal Youth Correction program and the Army system one of the most patent variances is that after a military prisoner has satisfactorily executed his period of confinement, his parole, and even has evidenced correctional adjustment, there is no authority for setting aside his conviction. On the other hand, the Youth Corrections Act permits the Youth Division to set aside the conviction of those who deserve it and thereby grant the offender a new start on life as though he or she was never convicted.

For those military prisoners who are found worthy of clemency, the Secretary of the Army may remit the portion of an unexecuted sentence or if the offender is an enlisted member, the

Secretary may order his honorable restoration to active duty if he has not been discharged. If he has been discharged, the Secretary may authorize his reenlistment, or upon written application, order his restoration to the Army. Such an order revives the enlistment contract for a period equal to that not previously served under it. The honorable restoration authority is also applicable to military enlisted prisoners confined in other Federal penal or correctional institutions.[109] Such action however does not alter the fact or the record of conviction and cannot be considered commensurate with the benefit of having a conviction set aside as authorized under the Federal Youth Corrections Act.

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109. 10 U.S.C. 3663(b), Dept.of Defense Instruction No. 1325.4 (7 Oct. 1968), and Army Reg. No. 633-35 (12 Jun. 1967).

CHAPTER V

APPLICABILITY OF THE FEDERAL YOUTH CORRECTIONS ACT TO MILITARY

A. Military Versus the Federal Judicial Systems

The application of the sentencing procedures of the Federal Youth Corrections Act have been declared not to be applicable to military tribunals. Although the Youth Corrections Act does not specifically state whether its provisions apply to military courts, the issue as to whether the term "court" as used under the Act also includes military courts was resolved in a case where defense requested and the Law Officer denied to give sentencing instructions under the Youth Corrections Act. Upon appeal and review, the ruling of the Law Officer was upheld under the rationale that the Youth Corrections Act in Title 18 of the United States Code, when read as a whole, leads to the conclusion that "court" means the Federal District Courts. The decision went on to say that even if the Act applied to the military it would not be applicable in the case at bar since the Act limits its scope to the territory of the United States and the offense was committed on foreign soil. It was further pointed out that a courts-martial could not even grant the sentence of suspended imposition or execution of punishment, or sentence the offender to the custody of the Attorney General for treatment and supervision

as provided for under the Act.[110] This judicial determination as to the inapplicability of the Federal Youth Corrections Act was upheld and restated in a subsequent case in which the defense sought to have the trial declared null and void since the procedures of the Federal Juvenile Delinquency Act were not applied by the courts-martial. It was held that such procedure under Title 18 United States Code, Sections 5031-5037, are not applicable to the military. In this case the Board of Review spelled out the fact that there are two separate judicial systems each governed by its respective legislation. The Board reasoned that since the military judicial system is derived from Article I, Section 8, and the Federal judicial system is derived from Article III of the United States Constitution, they are separate and distinct regardless of the merits found in particular statutes of systems existing in either one.[111]

In view of the present status of the law, courts-martial may not use the system of sentencing, treatment, parole and set aside of conviction available under the Federal Youth Corrections Act unless specific legislative and regulatory changes are accomplished.

B. Desirability of Adoption by the Military

Before entering into a consideration of what legislation, regulatory and administrative changes may be required for the armed forces to adopt a modern system as the Federal Youth

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110. ACM 16234, Castro, 28 C.M.R. 760 (1959).
111. ACM S-21078, Russel, 33 C.M.R. 893 (1963) and CM 409554, Thieman, 33 C.M.R. 560 (1963).

Corrections Act, it is appropriate to first determine the desirability and the degree of adoption of such a system and the possible effect upon command discipline.

It has already been noted that the military judicial system does not provide for any differential procedure or treatment of juvenile or youthful offenders. All are prosecuted and sentenced under the same system. The Department of Defense has declared its policy that discipline is to be corrective rather than punitive and further implementing regulations by the Department of Army have parroted this theme in glowing terms. However, the military system of sentencing, treatment and parole has not kept abreast of the Federal judicial treatment of juveniles and youth offenders. It may be difficult for some of our senior officers to realize or finally accept that today's Army is a "citizens army" as opposed to the old time "brown shoe" army which reflected a society of another era. It is common knowledge that large numbers of enlisted personnel and even greater numbers of the officer corps are now college graduates and even those that are not are far more educated than their predecessors. Nevertheless, in this day and age the military is still struggling under archaic concepts of sentencing, treatment, and limited parole of prisoners.

The following table serves to provide an insight of the overall age distribution of male military personnel on active duty in the Department of Defense and the changing character of its

composition.[112]

TABLE IV
(thousands)

Attained Age	30 June 1960	1961	1962	1963	1964	1965	1966	1967
Total	2,445	2,452	2,776	2,669	2,658	2,625	3,061	3,342
17	62	54	46	48	49	42	38	29
18	140	160	155	135	121	136	152	135
19	215	237	263	235	208	188	348	316
20	227	234	268	285	260	237	392	558
21	188	187	226	234	282	279	333	455
22	153	139	186	175	221	249	267	286
23	160	137	201	173	186	199	206	216
24	168	152	182	188	165	149	146	167
25	101	106	130	136	121	106	111	131
26	81	82	102	88	87	82	85	100
Median Age of Total Active Duty Males	24.5	24.5	24.2	24.3	24.0	23.9	23.0	22.6

The number of active duty members in age groups after age twenty-six decreases substantially. What is significant is the decreasing median age of the overall total manpower and the increasing

112. Letter from Mr. Foster Adams, Director, Directorate for Statistical Analysis, Office of the Assistant Secretary of Defense to Major Steven Chucala, 26 Sept. 1968.

number of younger members of active duty.

Service in the armed forces of the United States is available to persons as young as seventeen years of age. For the overwhelming majority of persons entering the military service, it is their first true emancipation from their parents and it becomes obvious that what occurs to these persons while in the military establishment may affect the remainder of their lives, either adversely or favorably. Entry into the military service is either the initial exposure to a career in the armed forces or a stepping stone to life in the civilian community. The training and discipline received while serving on active duty may mold the individual into a solid and productive citizen or as in some cases brand him as a criminal for the remainder of his life. Our modern day armed forces of almost three and one half million members, experiencing a considerable turnover in the younger element, is of such magnitude that the practice of military justice must conform as closely as possible to the most modern civilian practices permissable within the military system.

One may ask himself: Why should the military concern itself with the future of individuals? Why shouldn't the military concern itself only with instant obedience of the troops and forget about rehabilitation and orientation of promising offenders? Why shouldn't the military close its eyes to the civilian society around it and merely concern itself simply with military necessity?

In some respects, either by intention or circumstance, the military has managed to simply concern itself with immediate problems and solutions without consideration to extra-military affect. One may argue diametrically opposed positions to these questions. However, the answers should be obvious based upon present day society, the major role that military service has within our economy, and its affect upon millions of individuals. Accordingly, the military establishment can no longer be viewed as a speck in the periphery of society. It is an integral element of our American society which of its nature must assume responsibilities that may seem collateral to its mission but essential in its relation to the civilian community. The adoption of a youth corrections act is an example of fulfilling military justice while at the same time providing penological practice in accordance to and in furtherance of both military and civilian goals.

C. Changes to Make Act Compatible

Commencing with the proposition that adoption of a system similar to the Federal Youth Corrections Act is necessary, it is apparent that some changes would be required so that it will meet the needs of the service. The age group covered should commence with seventeen year olds rather than eighteen year olds and include members at least up to thirty. The seventeen to thirty year age span appears appropriate since persons are eligible for enlistment at seventeen years of age and many enlistments or

inductions occur of individuals in their mid-twenties who have received temporary deferments from the draft. The thirty year maximum age will cover most all possible situations of a first tour of duty and cover what the author considers the formative years of an individual. The scope of the act would have to be enlarged to apply on a world-wide basis rather than limited to the United States because of the military placement of personnel. The issue as to whether the act should apply to particular offenses only, should be answered in the negative. No restrictions should be established by categories of offenses. Its application should be left to the discretion of the court or judge as it is in federal civilian practice.

A major problem area would have to be overcome when the courts-martial is faced with the responsibility of sentencing. As mentioned earlier, the court receives limited information about the accused and virtually nothing in the line of a professional prognosis of his propensity for rehabilitation or of the type of treatment best suited to the offender and the needs of the service. Therefore, the court, whether it be the military judge or the court members who are passing sentence, must have a thorough pre-sentencing report of the offender to intelligently determine an appropriate sentence. Such a report, being precise and thorough would certainly avoid the ridiculous situation evidenced by the latest judicial fiasco in sentencing. I refer to a guilty plea

case of unauthorized absence of which the accused was found guilty and sentenced to confinement at hard labor and a bad-conduct discharge. The accused had been awarded the Vietnam Service Medal with two stars and the Republic of Vietnam Campaign Medal. However, evidence of said awards were not formally introduced into evidence and there was no evidence that the accused wore them at the trial and even if he did there was no evidence to indicate that the court should have considered them in passing sentence. Accordingly, the United States Court of Military Appeals considered this to be a deprivation of the accused's effective assistance in regard to the determination of his sentence and simply set aside the findings of guilty and the sentence, and ordered the charges dismissed.[113] This is but one example of the results of the present inadequate system of sentencing.

Along with a pre-sentencing report there will be required the services of an evaluation agency to which borderline cases may be referred for evaluation and recommendation to the court as to whether the offender will receive benefit under a military youth offender program. The court will then decide whether or not to commit under this program as is done in the Federal system. Due to military necessity, the period of evaluation may have to be considerably less than the sixty days afforded under the Federal

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113. United States v. Rowe, 18 U.S.C.M.A. 54, 39 C.M.R. 54 (1968).

Youth Corrections Act. This time period will greatly depend upon the workload, number of professional personnel assigned and the ability of the evaluating agency to function within a time table that can only be established by actual experience. This same type of evaluating agency will determine the type of training and specialized treatment of each individual sentenced under this system. Additionally, a special confinement facility will be necessary for this program. Persons committed under the Act should not be associated with regular prisoners in order to achieve the proper environment to motivate and rehabilitate.

The sentencing period of six years under the Federal Youth Corrections Act does not appear reasonable for military purposes. It appears that two separate sentencing periods are required to take care of prisoners who are sentenced to confinement without a punitive discharge and those sentenced to confinement with a punitive discharge. A shorter sentence is deemed more in accordance with military needs since it is preferred to get the prisoner back to society as soon as possible and to limit parole supervision so that it does not run on for many years which might even conflict with the soldiers termination of active duty. It is therefore suggested that for prisoners whose sentence does not include a punitive discharge, the confinement sentence should be for a maximum of two years with mandatory parole one year prior to completion of said sentence. Prisoners whose sentence

includes a punitive discharge, should be sentenced to a four year term with mandatory parole within two years of completion of said sentence.

Turning to the issue of whether the military needs to establish its own youth corrections system or just simply utilize the existing Federal Youth Corrections Program. Mr. Neff, Chairman of the Federal Youth Corrections Division, stated that he could handle military committed youthful offenders if the armed forces could commit them under the Act. However, after the author explained that the Army would be interested in the ultimate return of the majority of these prisoners to military duty and that the Federal program was aimed at orientation towards civilian life, he admitted that in order to accomplish military training and orientation, it would be best for the armed services to conduct their own program.[114] This author shares the same opinion.

Another area for consideration is the procedural application of such a system by courts-martial. Sentencing would either be by the military judge or the court members. Where the military judge is passing sentence there should be little concern if a program is established to thoroughly orientate judges on the various confinement facilities and their respective programs and capabilities. This training should of course be accomplished prior to the judges

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114. Supra note 61.

assumption of judicial duties. With adequate training it can be assumed that the military judge will have the requisite knowledge to properly consider all circumstances and apply a military youth corrections act when appropriate to the case at bar. Where sentencing is to be accomplished by court members it will be necessary that each court be fully advised of the provisions, purposes and results of such an act in every case. This instruction by the military judge will be in addition to other sentencing instructions. It will then be up to the court members to determine a sentence.

The determination as to whether a specialized program as the youth corrections system should be the punishment imposed, may suffer at the hands of a lay group of court members sometimes ranging from six to nine. Due to their limited knowledge of penology and the inevitable varying opinions as to an appropriate sentence which usually results in a compromise, sentencing by court members may not result in the best interests of the accused, the needs of the service or civilian society. It is the author's opinion that sentencing should be the sole responsibility of a military judge except in capital cases. Without getting into a collateral discussion of this point, the court members could determine the guilt or innocence of the accused and the judge in a separate proceeding would pass sentence. This type of trial procedure would be more favorable and permit an experienced, totally

command uninfluenced professional to determine a sentence based upon the subjective needs of the individual.

The proposed military youth corrections act could be applied in general courts-martial. However, we must not lose sight of the fact that a conviction by a special courts-martial is equally a federal criminal conviction. Even though special courts-martial have a maximum confinement authority of six months it appears that amendment of such is in order to permit the application of a youth corrections act program. The Army has by custom and usage utilized these courts composed almost entirely of lay officers to administer swift and easy criminal convictions. Although some persons convicted by special courts-martial are eventually administratively discharged, the overwhelming majority are intended to return to active service by the mere fact that these courts do not have the authority to discharge unless a verbatum record of trial is taken and this requires Secretarial approval. Accordingly, the results of these courts, to which the majority of offenses are referred for trial, must not be underestimated and their reform should be of paramount concern to all concerned.

D. Effect upon Discipline

Whenever any change is recommended in the field of military justice one question is foremost in the minds of all. Namely, what effect might the change possibly have upon discipline. The term discipline is not often used if ever in civilian criminal

justice. However, in the military it has a far greater meaning than just the obedience of individuals of laws and regulations. It goes to the root of the commander's ability to receive obedience of his subordinates in such a high degree so as to perform his mission to engage the enemy and destroy him. It is the author's opinion that the establishment of a system as previously described modeled after the Federal Youth Corrections Act will have no detrimental effect upon command discipline. This program will not effect the existing military justice practices and only would come into consideration by the court after the conviction of the accused. Present punishments would continue to exist except that for individuals who are found to be ameanable to rehabilitation within a few years, the court will have an alternative method of sentencing which if satisfactorily completed by the prisoner would result in the setting aside of his conviction. The individual who is placed on parole will rarely if ever be reassigned to his old unit. Additionally, he may have even acquired a new military occupational skill. Accordingly, it is difficult to forsee any possible detrimental effect upon military discipline. On the contrary, the knowledge by the troops that such an enlightened system exists with an almost guaranteed restoration to duty at the previous grade held, when conviction is set aside would most likely result in praise and greater respect for military justice and discipline.

Unless the program is actually attempted and statistics accumulated, one can only assume that a prisoner who goes through this type of treatment, and is eventually given a second chance with a clean record, will during the course of said treatment come to realize and appreciate the benefit that has been afforded him. He will either remain in the military service as a useful member or enter the civilian community with a start in the right direction. For those who do not succeed in achieving a set aside of conviction, it may well be said that at least they had their second chance.

E. Legislative and Regulatory Amendments

The creation of a Military Youth Corrections Program may best be accomplished by the passage of a specific Act of Congress as was done for the establishment of the Federal Youth Corrections Act. The concepts of sentencing, treatment, parole and set aside of conviction have been presented and individually considered. Since each of these four areas is inter-related and dependent upon each other, they must all be present under one system in order for the program to properly function. The Uniform Code of Military Justice and the Manual for Courts-Martial do not provide authority for the establishment of a youth corrections program. Two alternatives immediately appear, either attempt to obtain general legislation providing for such a program and then wrestle with the task of amending every possible paragraph of the Manual for

Courts-Martial such as 75, 76, 78, 93, 125, 126, 127, etc., the Uniform Code of Military Justice and statutes concerning parole or simply seek a bill which will result in one enactment encompassing the entire program. By using the latter method the entire program may be clearly set forth and amendments to existing laws and rules would be automatically accomplished. This would eliminate piece-meal enactments and amendments. In the event the penultimate method is attempted, the program may simply be out of date in the practice of penology by the time all of the armed services and numerous Federal agencies agree to agree on a program that may not even resemble what was originally proposed.

CHAPTER VI

RECOMMENDATIONS AND COMMENTS

It is the author's hope and recommendation that a Military Youth Corrections Program be adopted as soon as possible. Further, that it be accomplished by a single legislative act which is inclusive of all the elements required. Once this is done the Department of Defense can issue implementing policies and procedures. Existing Directives and Regulations as cited in this thesis would require additional amendment to properly implement the program.

At this writing, the President of the United States of America, Honorable Richard M. Nixon, is advocating the termination of compulsory military draft and the substitution thereof of a volunteer program. Due to the large number of personnel, the diversity of intellect and technical skills required, the probability of achieving a volunteer force is somewhat uncertain. To attract a large scale volunteer force will require considerable salesmanship and positive incentives. One possible attraction, although remote, is to reform our military justice system to provide at least some of the benefits available in civilian federal criminal practice. Accordingly, the creation of a military youth corrections program will not only improve present military penology but also act as a plus factor in selling the virtues of our modern day armed forces to those on active duty or contemplating such enlistment.

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