COOPER

Military Justice or Injustice:

The Green Beret Case

by Henry B. Rothblatt

I am bound, as I write this article, by Title 18 of the National Security Act. I would face severe penalties if I discussed any of the classified information that was made available to me. In fact, a security check had to be run on me before I could become privy to this classified information. Thus, until the particulars are no longer classified SECRET, I am prevented from discussing some aspects of the case. However, there is nothing to stop me from analyzing the deplorable state of military justice today, using the Green Berets affair as the specific vehicle to spotlight the basic faults of the court-martial system.[1]

The most insidious of these faults is command influence. And it was this problem that so prejudiced the Green Berets case from its inception. Under the present setup, if the commanding officer has no interest in the proceedings, then the UCMJ is probably fair. But if his ego is involved, if he knows he has something at stake, if for some reason personal antipathy towards the accused is involved, then the commanding officer's influence pervades the proceedings.

As one of the civilian lawyers in the recent Green Berets case, I witnessed at close range incredible examples of the injustice of so-called military justice. The command influence of General Abrams prejudiced and tainted the legal proceedings which he had so ill-advisedly ordered. Before my eyes the CIA and the CID (Criminal Investigation Division) attempted to chip away at the constitutional rights of six loyal and dedicated Americans. They succeeded in destroying the distinguished military career of Col. Robert Rheault, commanding officer of all Green Berets in Viet Nam.

I made two trips to Viet Nam in connection with the case. After my first visit, I left convinced that no formal charges would be lodged. There was no proof that a murder or killing had occurred. During the investigative hearings, CIA agents had given contradictory statements when they answered my questions at all. It had to be obvious to everyone that not only were there no grounds for a court-martial, but that such a proceeding would be to the greatest detriment of the security of the United States. It would, in addition, erode the morale of all the officers and men in the enemy-infested boondocks of Viet Nam.

But, astounding as it seemed, after my first departure the decision was made to try Colonel Rheault and five other officers on charges of murder at a general court-martial. If convicted they faced sentences up to life imprisonment.

[1] It must be said that unfair though the administration of military justice can be today, it is still a vast improvement over the World War II brand when there were a million and a half courts-martial and 143 Americans executed by their own military. Over 45,000 servicemen were still in jail when the war ended. Congress was flooded with protests against "drumhead" justice and unduly severe sentences. By 1951 the Doolittle Board, headed by Gen. James Doolittle, reformed the old military-justice codes with its new Uniform Code of Military Justice. The old guard of the military practically accused Doolittle of being a communist, so liberal did they consider the new code.

Actually the UCMJ did not contain too much to cure the old evils. It did extend substantial due process rights to servicemen such as the right to a military and a civilian lawyer in a general court-martial, a right against self-incrimination, and a right to a fair and extensive investigative hearing.

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Behind the Headlines

Homer Bigart of the New York *Times* and Tom Lambert of the Los Angeles *Times* summed up the case:

In May or June of 1969 the Green Beret command in Nha Trang, headquarters of the 5th U.S. Army Special Forces Group, discovered evidence that its top secret, cross-border outfit, officially designated B-57, had been penetrated by a Vietnamese double agent. Thai Khac Chuyen, who acted as interpreter and guide to the Green Beret leaders of these intelligence-gathering patrols deep in enemy territory, was the suspect.

Sgt. 1/C Alvin L. Smith of Naples, Florida, was the intelligence sergeant attached to B-57 and he had recruited Chuyen. Smith had remained as Chuyen's control in the outfit and when he realized that his agent was probably a double agent, Smith began interrogating the suspect. Using a polygraph (lie detector) and sodium pentathol (truth serum), Smith established that Chuyen was indeed a double agent and a very dangerous one since he knew so much about the operations of B-57. The lives of every American in the outfit would be in jeopardy if Chuyen was allowed to go free.

The Green Beret intelligence apparatus went to Colonel Rheault with their findings and the case was taken out of Sergeant Smith's hands. Actually these B-57 officers were not trained Green Berets themselves but rather intelligence officers assigned to work with Special Forces. These officers had a series of meetings with CIA agents in Saigon and Nha Trang. The Nha Trang CIA agent said that the assassination of the double agent seemed to be a sound idea. Questioned about what the reaction in Saigon might be, the Nha Trang agent replied that his superior in Saigon had been responsible for 250 political killings in Laos and one more wouldn't make much difference. The Berets waited as long as they could for some definite instructions from the CIA but none was forthcoming.

Finally, after three days without instructions, yet with what appeared to be tacit approval, the Green Beret intelligence officers elected to follow through on the plan they had already rehearsed. Although Sergeant Smith objected to the execution, Chuyen was deemed too dangerous to go free.

Chuyen was injected with morphine to quiet him and then taken out in a boat into Nha Trang Bay where Capt. Robert Marasco, the Army stated later, shot him through the head with a .22 caliber pistol, weighted the body down with chains and tossed it into 200 feet of water.

The day following the execution, a CIA signal finally came through from Saigon instructing the Berets to return Chuyen to duty because he had the "highest moral and flap potential." The Berets replied that Chuyen had been sent out on a dangerous mission equipped with a one-way radio that could only transmit. That, the Berets thought, was that.

Then, on the morning of June 30, Sgt. Alvin Smith presented himself at CIA headquarters in Nha Trang seeking, he said, asylum. He poured out the story of the assassination of Chuyen 10 nights before. It looked to Smith, he declared,

like another assassination was being considered. He was convinced he was to play the principal role—because of his objections to the killing of Chuyen.

The CIA agent informed his superiors in Saigon of what Smith had said. They in turn went to General Abrams who immediately dispatched two of his most able CID men to Nha Trang to investigate. A CID agent, to put it bluntly, is a cop, a detective. He goes around and investigates the accused person and helps prosecute the case.

Bigart and Lambert, in their newspaper stories, claimed that under intensive interrogation several of the B-57 officers admitted to having performed the execution. When Abrams reviewed the findings of the CID, he could hardly contain his anger. He picked up the telephone and called Colonel Rheault. Abrams asked him point-blank if the killing had occurred. To protect Abrams and the Military Assistance Command, particularly since they were talking on an open telephone wire, Rheault stuck to the cover story that Chuyen had been sent on a dangerous mission across the border. Abrams hung up in fury.

In a boiling rage, Abrams was reported to have ordered his men to "go in there and clean out those bastards." The beginning of one of the biggest flaps in U.S. military history was on.

"Abe forgot to count to 10," a seasoned denizen of the Pentagon remarked ruefully as the implications of the Green Beret affair became increasingly embarrassing to everyone concerned.

Berets Arrested

On July 20, Colonel Rheault was arrested and confined to a house trailer inside Long Binh stockade. The other five officers, Maj. Thomas Middleton of Jefferson, South Carolina, Maj. David Crew of Baltimore, Capt. Robert Marasco of Bloomfield, New Jersey, Capt. Leland Brumley of Duncan, Oklahoma, and Capt. Budge E. Williams of Athens, Georgia, were jailed in maximum security, five-by-seven-foot cells. Another man implicated, Chief Warrant Officer Edward Boyle of New York, was reassigned to a military police company at the Long Binh jail where he could be kept under surveillance without actually being confined. General Abrams' chief JAG (Judge Advocate General) officer had special plans for him. Sergeant Smith was held somewhere else.

On July 24, Colonel Rheault, the B-57 officers and Sergeant Smith were accused of premeditated murder and conspiracy to commit murder. Up to this time, the incarceration and charges against the Green Berets were top secret within the Saigon command.

Letters from the men to their families soon had Congressmen asking embarrassing questions of the Pentagon. It was not until August 6 that the Army announced publicly that Colonel Rheault and his fellow officers were being held and investigated.

A Call for Help

The Army officer-lawyers assigned to the defense of Rheault and his men held a strategy meeting on August 10. They felt they needed an experienced civilian criminal lawyer. One of the military defense counsel officers, Capt. John S. Berry, had read my books on criminal law.[2] He suggested to the others, Capt. John W. Hart, Capt. Myron D. Stutzman, and Maj. Martin Linsky, that I be retained to come to Viet Nam. The other defendants and JAG officers concurred.

On the 14th I received Berry's letter and also a telegram officially asking me to represent Maj. David Crew, Capt. Leland Brumley, and Chief Warrant

[2] *Complete Manual of Criminal Forms*, F. Lee Bailey and Henry B. Rothblatt (Lawyers Co-operative Publishing Co., 1968); *Defending Business and White Collar Crimes*, by F. Lee Bailey and Henry B. Rothblatt (Lawyers Co-operative Publishing Co., 1969); *Investigation and Preparation of Criminal Cases* (Lawyers Co-operative Publishing Co., 1970)

Officer Edward Boyle. It was understood that while nominally representing these three men, I would in effect be acting on behalf of all of the accused men.

In a day and a half I procured my Viet Nam visa, got both arms full of shots, filled out security forms which I sent to the Judge Advocate General's office in the Pentagon, and on Saturday morning, August 16, was on my way to Viet Nam. The day I arrived in Saigon, August 18, the men were released from their cramped cells and put in more comfortable detention.

Pretrial Proceedings

The Article 32 investigative hearing had begun before my arrival. However, it was postponed until I could reach Saigon when news of my entry into the case was made known. An Article 32 is equivalent to a preliminary hearing in a civilian trial. It is one of the few progressive tools in military justice. As a matter of fact, there is more opportunity to obtain all the evidence available in an Article 32 hearing than in any civilian pretrial proceeding.

The military was most helpful to me. After my first night at the Majestic Hotel in Saigon, I was moved out to Long Binh and given a comfortable house trailer to use as sleeping quarters and office. A jeep and driver were always at my disposal. I could see my clients in their new air-conditioned quarters when I wanted to. I was even entertained at dinner by Lt. Gen. Julian Ewell, commander of II Field Force. Altogether I received a first impression of cooperation and a desire on everyone's part to see that justice was done.

The Article 32 hearings resumed on Wednesday, August 20. They were held in the chapel at Long Binh with Col. Harold Seaman, the investigative officer, presiding. Seaman was not an Army lawyer, merely an officer assigned to this duty. It was about 100 degrees and there was no air conditioning.

Everyone was hot, uncomfortable and sweating. It was later reported that General Abrams' prosecuting officers said I "tore up the case." I certainly tore into the CIA and the CID agents. Their perspiring was most profuse in that sweltering chapel.

Every time we pressed the CIA man into a corner he very conveniently parroted the familiar phrase, "I'm sorry, sir, I cannot answer your question. I've been ordered by my superiors to invoke executive immunity under the U.S. Code. We are an agency of the executive branch of the government and we invoke executive immunity."

Since the Article 32 hearing procedure allows a certain amount of speechmaking, I decided to play a little with the CIA man. "We're here in an American court of military justice, and all of us, you and I and all of these officers sitting here, are interested in one great thing, and that is to learn the truth. Is this not so?"

What could he say to that? Of course he said yes.

"You'll agree with me, will you not," I continued, "that these questions that I'm putting to you now, these questions that you decline to answer, would shed a great deal of light on what you're saying about the accusations against these officers. Don't you think that, under the principles of basic justice, the truth should be heard and tested right here in this courtroom and that you should tell us that truth and not hide behind immunity that you invoke?"

The agent left the hearing room on the verge of tears. The CIA men reported conflicting stories when they talked at all and finally I turned to the investigative officer who presided over the hearing and asked for the dismissal of charges.

I cited to this layman judge the Supreme Court decision which reenunciated the language of the Code of Military Justice which says that in every military criminal proceeding the prosecution must make available to the accused any and all evidence that bears upon his innocence. "The government, the prosecution, can't have it both ways," I declared. "Either lay all of the evidence on the table and make it available to us so that we can examine and cross-examine, or forget the case." I paused and then added, "And I suggest that you forget the case."

After another pause, I threw in one more persuasive argument for dismissing the case. The New York *Times* had published a front-page story pointing out that a Navy search, dragging the Nha Trang coastal waters and sending down frogmen to recover the body, had failed to turn up anything.

"It's basic law," I concluded, "that in the crime of homicide you must provide a corpus and no corpus has been proven in this hearing. So on either score you do not have a case."

I and my military co-counsel left the hearings feeling confident that charges would be dismissed. I had done everything in my power to give the Army an opportunity to see the light and slide out from under the case General Abrams had created.

Temporary Respite

I left Viet Nam on Saturday, August 23, convinced that I would never have to return. Back in New York a significant phone call came through to me from the chief administrative assistant to Rep. John Moss of California, a member of the House Government Operations Committee. He had read the stories in the New York *Times* telling how the CIA agent had invoked executive immunity. He pointed out to me that it had been specifically stipulated by Congress when it passed the executive immunity statute that no agency of the executive branch would invoke executive immunity except with the personal consent of the President. I stored this information for possible future use though it was incon-

ceivable to me that there would be a court-martial.

During my first trip to Viet Nam, Secretary of the Army Stanley Resor arrived for a conference with General Abrams. Although the Secretary never contacted me, it seemed logical to expect he would have brought some comment from the White House on the Green Berets case. It had been a front-page story in the newspapers of the world since it broke.

The Role of Secretary Resor

Later I was told that Secretary Resor's mission was twofold. His most important assignment was to work out with General Abrams a method by which a withdrawal of American troops could be effected without completely disrupting the war effort. The President, Mr. Resor told the commanding general of U.S. troops in Viet Nam, was anxious to announce the beginning of meaningful troop withdrawals.

A secondary task given the Secretary was to try to persuade the general to gracefully withdraw the charges he had leveled against the Green Berets and get the whole distasteful and embarrassing affair out of the public eye.

Abrams, it was reported to me, burst into a characteristic fit of rage at the gentlemanly, mild-mannered Secretary for trying to reach into his command. He announced, in effect, "I'll get the troops out for you without completely blowing the war, but you leave the Berets to me!"

The Berets remained in confinement at LBJ while the Article 32 transcripts were studied at length. In my New York office I waited expectantly for some word that charges had been dropped against my clients.

In September, General Abrams was called to Washington to discuss directly with the President plans for troop withdrawals, the biggest thing on Nixon's mind at the time. But there was something even bigger on Abrams' mind. He conveyed it to the President loud and clear. The inference was that if the administration interfered with the Green Beret case, things might not go so well for troop withdrawals in Viet Nam. At the moment the general was indispensable. He was the only one who knew how to bring the troops home gracefully and quickly.

Murder Charged

General Abrams returned to Viet Nam, the President announced the troop withdrawal, and almost immediately afterward, on September 18, General Abrams' command announced that Colonel Rheault and the Green Beret officers would face a general court-martial on murder charges. A tentative date for the trial was set for mid-October.

I hurried once again to Viet Nam. I was greeted at Tan Son Nhat Airport by several of my military co-counsel. I knew my first job was to encourage these military lawyers. From their correspondence it was apparent that they were as disheartened as I that the court-martial had been ordered.

Preparing for Trial

I laid it on the line with my co-counsel. "It appears that we're taking on not only the top brass here in Viet Nam, but also the Secretary of the Army and the Secretary of Defense who apparently affirmed the decision of General Abrams to prefer these charges against our clients. I hope you realize that you are lawyers first and Army officers second and that your first responsibility is to your clients."

We set up shop in Saigon's Caravelle Hotel and prepared to do battle. We knew it would be a tough one. Civilian law places particular importance on the separation of the functions and the independence of the individuals who administer the criminal system. The district attorney decides whether to prosecute. Then the grand jury considers the evidence and decides whether to indict. The judge is an independent official.

The defense counsel is hired by the defendant. The jury is picked from the defendant's peers by random selection. The appeals court is an independent tribunal.

Command Influence

It is quite different under the court-martial system. The commanding officer of the area plays the most influential role in all these functions. In our case General Abrams made the decision to prosecute, perhaps even over the contrary recommendation of his subordinate, the investigating officer. Abrams would handpick the jury from among the officers under his command. Both the prosecutor and defense counsel were from his legal office. And when the trial finished, General Abrams would have the first-level review of the proceedings. He would decide on matters of law and also on the sentences.

The commander also has a suffocatingly broad range of administrative powers. In our case he came up with a most clever use of his power. Since the only way to prove the corpus now was to find an eyewitness who would testify to having seen the crime committed, he granted immunity to CWO Edward Boyle and Sgt. Alvin Smith. Smith's testimony could not prove the corpus. However, Boyle's testimony could conceivably accomplish this. Boyle was now in a position to testify against his companions without putting himself in danger of prosecution.

The cards were heavily stacked against us. On top of everything else, unlike my experiences on my first trip, all cooperation and logistical support had been withdrawn from the defense. I had no transportation at my command. No office, no secretarial help, no typewriters, no support of any kind was forthcoming.

All our mail was read and our telephone calls monitored. Even memos sent by myself to Captain Berry, my military co-counsel, were commandeered

and read. When I finally secured transportation to go out to Long Binh to see my clients and get a copy of the Article 32 transcripts to take back and study, I was refused the right to read the transcripts anywhere but on the post. Since there was no office space available (another military co-counsel, Maj. Martin J. Linsky, had been moved from his office to a small cubicle which he had to share with two other officers), I asked, "Where do I study the transcripts? Sitting out under the sun in the dust?"

I had only one route to follow now. I had to harass the Army in every way possible with pretrial motions to keep them off balance and hope that somehow a way could be found to achieve something approaching a fair trial for my clients. It was obvious that the entire objective of General Abrams' command was to convict and severely punish the Green Berets—not merely my clients, but the Special Forces units around the world.

Motion, Motion, Motion

Our first tactic was to file a motion requesting that Colonel Rheault and his fellow officers be allowed to hold a press conference. The prosecution had held a press conference giving its side of the story, yet my clients were denied this right. The motion was denied.

Our next motion was for logistical support equal to that enjoyed by the prosecution. We asked that a Tiger telephone exchange (the Army communications system) be installed in the rooms of all defense counsel and in the rooms of the defendants so we could communicate with our clients. In this motion we threw in the names of additional civilian lawyers who would be working on the case, mentioning F. Lee Bailey and Edward Bennett Williams among others. I'm sure there was much consternation at the commanding general's office as the truth began to dawn on them about how big and open a trial this would become. We also asked for an air-conditioned sedan, tape recorders, photography equipment, post exchange and officers' mess privileges and a secretary-stenographer on a full-time basis for each of the civilian counsel. The motion was not granted.

Next we filed a motion for permission to request logistical aid from the various press bureaus. The media representatives were only too happy to give us aid. This was a motion hard to deny since the Army gave us only one thing, extreme harassment. The press became our chief ally in the struggle for justice for our clients. The National Broadcasting Company supplied us a car one day, a wire service bureau the next, and even the New York *Times* lent us transportation. The Columbia Broadcasting System provided the typewriter and the American Broadcasting Company the typist to file our most important motion. This was a request to the President of the United States that he, as Commander-in-Chief of the nation's armed forces, dismiss the charges since there could be no *prima facie* case and the court-martial would be an international disaster. We further asked that if the President was not going to dismiss the charges permanently and completely, that he dismiss the current proceedings and order a new, fairer Article 32 hearing before himself as Commander-in-Chief so that all the relevant information could be heard. We further pointed out that executive immunity so freely invoked in Saigon could only be taken with his personal and specific approval. We argued that the Article 32 hearing in Saigon was completely tainted and prejudiced with command influence emanating from General Abrams.

We concluded the motion saying, "It's basic to any sense of democratic justice that the policeman cannot be policeman, prosecutor, judge and jury all rolled into one." We said, "We want you, Mr. President, to be the judge if you won't dismiss the charges."

General Abrams' prosecutor all this

time was telling the Pentagon, and presumably the President, that they had a witness who could establish the corpus. Of course he was referring to one of my clients, CWO Ed Boyle, who had been given immunity.

I had a long talk with Ed at Long Binh where he was attached to an MP company. We agreed that when he was put on the stand, if he did not want to betray his comrades, he should make a little speech refusing immunity and refusing to say anything that might incriminate Rheault and the others. If General Abrams wanted to prosecute him for being faithful to his comrades-in-arms, he would become a hero for refusing to be pressured. If he were convicted of a crime for not informing on his fellow Berets, the sentence could not be harsh and a statue of him would probably be erected to the memory of a man who prized loyalty above all else. The general who had pressured him into betraying his comrades would be the heavy. Boyle went along with this thinking and we were ready to play our last pretrial card.

The Press Helps

Somehow we had to let President Nixon and his top advisers on the case know that the Army was absolutely wrong in its assumption that Boyle would testify and prove the corpus. We needed an independent and respected person to verify that Boyle would refuse to testify against his fellow Berets. Who could be better than the New York *Times* Saigon correspondent, James Sterba? He knew that the Army's case depended to a large extent on Boyle's testimony and eagerly accepted my invitation to an exclusive interview with Boyle.

On Thursday, September 25, we drove up to Long Binh and visited Boyle. I turned on my tape recorder and Sterba took over. Boyle declared that under no circumstances would he "rat on" his buddies.

Sterba's story came out in the New York *Times* on September 27, the day I left Saigon for the United States, this time fully expecting to return for a third time to try the case. Abrams had his teeth in this one and would never let go.

Nixon Intervenes

On September 29, in a San Francisco courtroom where I was trying a case, a wire-service reporter burst in and asked me to come to the press room and make a comment. President Nixon had just announced through the Secretary of the Army that the charges against the Green Berets had been dropped.

The comment I refrained from making was in the form of a question: "Did he tell General Abrams before he made the announcement or let Saigon pick up the news through the press?" I know I wouldn't have wanted to be the Presidential minion who had to break the news to "Old Scruffy"!

The Green Berets and their lawyers have caused the generals responsible for this fiasco, and the CIA, to suffer a humiliating defeat. The brass and the spooks have not yet recovered. We feel they are intent upon revenge. The acquitted Green Berets and their counsel will still have to face this vendetta. It is my fervent hope that the entire Green Beret organization around the world will not be harassed out of existence as a result of this affair. The lawyers can take care of themselves.

An even greater menace highlighted by these proceedings is the problem of command influence. When the commander has a personal interest in the outcome of a case, the whole concept of military justice becomes a mockery. This is a situation that must be changed if our soldiers at the front and elsewhere are to get a fair shake in military courts.