They Call It Justice, by Luther C. West

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Military justice is not often the object of public attention. When it is, its exposure usually results from a notorious case or incident, such as the My Lai massacre or the "Presidio Mutiny" of the late 1960's. Even episodes like these afford the casual observer only a fragmented view of military justice, since attention is typically focused on events ancillary to the criminal process itself. Consequently, many people perceive military justice as something of a dinosaur in modern jurisprudence; to much of the public "drumhead justice" is synonymous with military justice.

Unfortunately, Luther West's book, They Call It Justice,1 will do little to change this image or to further the public's understanding of military justice. Indeed, the book attempts to capitalize on the public's misconceptions by sensationalizing and distorting some aspects of the system. The one-sided picture that results obscures any realistic treatment of a legitimate and important issue: to what extent should commanders, and military personnel directly responsible to commanders, control the military justice system?

The commander's role in the administration of justice in the military has long been a source of controversy2 and continues to be debated to the present day.3 Courts-martial began as instruments of discipline; only later did they take on attributes of a criminal justice system.4 Since commanders were responsible for discipline, they became responsible for the administration of justice. Over the last half century, however, many of the commander's powers in the military justice system have been restricted or removed,5 and this trend

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1L. WEST, THEY CALL IT JUSTICE (1977), [hereinafter cited as L. WEST].
4See generally J. BISHOP, JUSTICE UNDER FIRE, 1-15 (1974); W. WINTHROP, MILITARY LAW AND PRECEDENTS 45-56 (2d ed. 1920). This is not to say that military law in antiquity was without structure and form, only that its framework was designed to achieve discipline. See Stuart-Smith, Military Law: Its History, Administration and Practice, 85 LAW Q. REV. 478 (1969), reprinted in MIL. L. REV. BICENTENNIAL ISSUE 25 (1975).
continues today. Nevertheless, based upon his own experience, as well as his study of the military justice system, West advocates not only the removal of the commander from the military justice system, but also the removal of the military from military justice, or, in essence, the removal of the justice system from the military. Though rational support for such a radical solution to the controversy has been presented elsewhere, West fails to make the case for it in his book.

West's look at military justice is highly personal. Beginning in 1950, he spent seventeen and a half years on active duty as an Army lawyer in the Judge Advocate General's Corps. Most of the book consists of anecdotal accounts of cases in which he was involved or which he observed while on active duty or as a civilian after his retirement in 1968. Interspersed with these narrations is a brief description of the history of command control in the military from World War I to the mid-1960's. This historical discussion is a condensed and less evenhanded version of a lengthy law review article on the subject written by West in 1970. The book concludes with the assertion that military personnel are incapable of administering a truly just criminal system, and a recommendation that everyone in the military justice system, except military jurors, be replaced by civilians.

West's criticism of military justice rests primarily upon his own experiences in dealing with the system, as a service member and a civilian. Each of us is, of course, wedded to the truths of his or her own experience. Refutations of opinions of this nature are therefore muffled by the walls of subjectivity. This author, as either a defense counsel or a prosecutor, has never encountered the abuses described by West; nor has he in discussions with literally hundreds of other military lawyers, heard of abuses on the scale described. This is not to say that such abuses never occur, nor, that the potential for abuse is not present. However, it is incorrect to describe commanders and military lawyers as "grossly dishonest in the administration of military justice." Unfortunately, such hyperbole marks many of the pages of the book.

Beyond this largely meaningless standoff in personal experience, some observations about West's judgments are in order. West describes several means by which commanders have affected the results of courts-martial. The most common method was the practice of communicating with court members (jurors) in a manner which suggested what results were desired in certain cases. The force of West's criticism of such practices is blunted, however, by his own willingness to manipulate proceedings to suit his own

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6See Cooke, supra note 3.
9L. WEST, supra note 1, at 12.
10This procedure was finally prohibited in 1969. Id. at 107.
purposes. For example, West recalls a contested case in which, just as the
court members were about to retire to deliberate, defense counsel West found
it appropriate to make "an 'administrative' announcement." He told the
court members, in effect, that the last flight out of the remote Korean village
where the case was being tried would depart in half an hour. Since a convic-
tion would necessitate further proceedings to adjudicate sentence, "... anything other than a very fast acquittal would require all court members to
spend the night at Kowon," a fate which West described as "a very dismal
prospect." The court members quickly acquitted West's client and caught
their flight to Seoul. In West's opinion, this case "... reflects military justice
in its best light."

On another occasion, West, again as defense counsel, cited to a court-
martial several state cases in support of a position on the law, but opted not
to bring to the court's attention federal cases, of which he was aware, which
contradicted his position, deciding "... that that was a distinction which
would have to be researched by the prosecutor." With this deviously eclectic
method of argument West secured an acquittal by persuading a jury of lay-
ment (who could in those day overrule the law officer on a question of law)
that his position was correct. Of this occasion, West writes, "To me, there is
no greater than this in the practice of law."

West's proud description of such questionable stratagems reflects that his
concern over manipulation of the system hinges on who is doing the
manipulating. To be sure, the commander's unique position may render him
capable of more pernicious influence than a defense counsel can exercise,
even when the latter uses gambits on the fringes of ethical conduct. Never-
theless, West's willingness to bend the rules to his ends should suggest that his
vantage point is a highly egocentric one. His is not a detached view of the
system.

Indeed, West exhibits distaste not only for military justice; he clearly ex-
presses his disdain for the military as a whole. He indicates that he harbored
"resentment against the officer corps generally" as a result of his experience
as an enlisted man in World War II, and that he rejoined the Army reluc-
tantly in order to support his family. He felt that many officers "chose to re-
main in military service rather than join the competitive world of civilians." Obviously, little happened to change his opinion of the military during the
next seventeen and a half years.

11Id. at 71.
12Id.
13Id.
14Id. at 4. It should be noted that a court-martial is a federal forum.
15See ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-106(B) (1975).
16L. WEST, supra note 1, at 4.
17Id. at 5.
18Id.
The chapters dealing with cases with which West was connected as a civilian, following his retirement in 1968 should be read with his opinion of the military in mind. Among those discussed are the cases (or non-cases) resulting from the My Lai massacre, and several incidents arising out of dissent or protest against the war in Vietnam, or against racial injustices. There can be no denial of the many unhappy consequences of the war in Vietnam or of the phenomenon of racism. The forces and events surrounding the war and racial discord left many eddies of divisiveness and tragedy in their wake in the late 1960's and early 1970's. The military, and military justice, were far from immune from the effects of these forces; indeed, the military was at the center of the storm in many instances. West goes too far, however, when he casts military justice as the only tear in what was a major rent in the social fabric of this country.

West asserts that military justice broke down during the war. In his opinion, the military justice system was not used to handle widespread dissent because "it did not work to restore discipline." While observation may be true, West in no way documents his claim that "the military threw in the sponge," and did not attempt to discipline its dissidents. Given this nation's acutely schizophrenic attitude toward the war, the military justice system was, by itself, incapable of reversing opposition to the war. To some extent, this may be because military justice is no longer a mere instrument of discipline to be used to bludgeon erring service members into blind submission. West fails to address the present function of the military justice system, nor does he adequately describe how a completely civilianized military justice system would have handled this disciplinary problem any better.

With respect to the My Lai cases, West asserts that Lieutenant William Calley was made the scapegoat for the tragic events at My Lai village and their aftermath, pointing to the heavy interest in the case at top levels of command, as well as the fact that Calley was the only individual convicted of any offense in connection with the massacre, as evidence of some form of conspiratorial design to shift "total responsibility for the massacre" to Calley. That there was interest in the case from the highest levels of government, and that Calley was the sole individual convicted in connection with My Lai are true. It does not follow from this that the military justice system inadequately handled the affair.

Charges were brought against numerous individuals in connection with My Lai. In some cases, charges were dismissed for lack of evidence, in others, acquittals resulted. In discussing two of these cases, those of Captain Ernest...
Medina and Colonel Oran Henderson, West acknowledges that the evidence introduced against each of these officers was not compelling; it is hard to fault either jury for acquitting either man. Yet he implies that the prosecution pulled its punches in these cases, though little more than speculation is presented in support of this insinuation. It is difficult to understand how such a last ditch attempt at a final cover-up could have in fact occurred. The My Lai incident was extensively investigated not only by Army criminal investigators and prosecutors, but by a congressional subcommittee and, independently, by a panel of Army offices under appointment by the Secretary of the Army. Consequently, the House Armed Services subcommittee found that while there was a failure to make "adequate, timely investigation" immediately after the massacre, the Army ultimately "overreacted by recommending charges in several cases where there was insufficient evidence to warrant such action." It seems unlikely that with all the scrutiny to which the My Lai prosecutions were subjected, Army officials could have whitewashed the case by holding back evidence in the prosecutions of Medina and Henderson.

My Lai exposed a serious breakdown in the Army's training and discipline. While ultimately criminal liability attached to William Calley alone, it is inaccurate to say that he alone was responsible for the event. The conduct of others, while either not rising to the level of criminal guilt, or being beyond the reach of court-martial jurisdiction, contributed to the event. The incident brought discredit upon the Army as a whole. The record reflects, however, that in the wake of this horror, the military justice system was used responsibly and with appropriate zealousness.

Perhaps the most glaring flaw in the book is its neglect of recent developments in the military justice system. Even if everything West described were true, its germaneness to a discussion of military justice today would be questionable. Copyrighted in 1977, the book treats no events more recent than 1972, and most of its attention is focused on the 1950's and 60's. Moreover, interspersed in West's description of his own experiences is his discussion of the history and development of military justice from World War I to the mid-1960's. The image presented by this telescoping of the near and
distant past is an "afterminded" look at military practices as though they survive today. Yet the sweep of the lens through which West directs our gaze is such that the most recent developments in military justice are not seen. Whatever truth is filtered to us through this distorted glass, it must be weighed against the knowledge that, just as when looking at the stars, we are seeing what was years ago, but may not still be there now.

The picture presented by West is not pretty. During World War I commanders has such complete authority over courts-martial that they could order retrial of a case which resulted in acquittal and could, without further review, order a death sentence executed. As late as the 1960's, commanders could engage in what in civilian life would be jury tampering by communicating with military jurors about matters likely to come before them. Powers like these affront most of us today, but it is important to remember that they were, at the times in question, legal. The court-martial procedures of yesteryear were, as they are today, prescribed by Congress, implemented by the President, and have historically been given great deference by the judicial branch. It is true that the military has generally had substantial input into these procedures, but ultimately determination of the nature of the military justice process rests with civilians.

But some of the practices which West discusses were illegal when they occurred. This is true, for example, of the practice of giving a defense counsel a noncompetitive efficiency rating, on which prospects for advancement rest because of his zeal or success in defending cases. This practice and related ones appear to have subsided in recent years; nevertheless, undeniably the potential for abuse is great when an individual's advancement and assignment prospects are in the hands of one with whom he is often engaged in an adversarial relationship. For this reason, in 1972 recommendations were made to the services to remove defense counsel from under the direct supervision of local commanders and their staff judge advocates. The Navy and Air Force have implemented such programs and the Army appears likely to do so within the near future. Thus, while the problem West describes does not seem quite so rampant as he makes it appear, the potential for it, and the very invidiousness of it when it does occur, are causing reform of the system with the goal of eliminating this evil. While such an independent defense structure

27See Cam, Introduction to F. Maitland, Selected Historical Essays at xix (Cam ed. 1957).
31Such as reassignment out of defense duties, possibly to an undesirable assignment, or other forms of harassment.
32Still, they may not have been entirely eliminated. Allegations of unfair treatment of defense counsel were made by some lawyers involved in the West Point Honor Code case of 1976.
may not entirely solve the problem. West's failure to even recognize the significant changes that have occurred undercuts the validity of his criticisms.

Also out of date are the criticisms of the United States Court of Military Appeals. While on the whole West wholeheartedly approves of the existence of this civilian court at the top of the military justice appellate system, he launches some of his heaviest criticism at the court, charging that it failed to eradicate command influence by taking a clear and consistent stand against it during the court's early years. He also chastises the court for failing to make more effective use of its power under the All Writs Act to closely scrutinize military justice practices outside the ordinary appellate process. West should have taken a more recent look at the court and its work.

CMA has taken a strong stand against any sort of command influence or tampering with the judicial process, and has indicated that it will use whatever powers it has to preserve the integrity of the system. Recently, the court has moved resolutely to judicialize military justice, making numerous changes during the past two years, many of which have restricted or removed powers previously exercised by commanders. For example, a commander can no longer reverse a military judge on a question of law. Decisions made by a commander which affect the administration of justice are subject to review by the judiciary, and often must be accompanied by a statement of reasons in order to be sustained. A commander's decision to impose pretrial confinement must now be reviewed by a magistate. A commander's determination of the availability of witnesses is subject to de novo review by a judge. A pretrial agreement, entered into between the accused and the convening

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While a defense counsel may be independent while he or she is in an independent defense structure, such an individual is dependent on those outside this structure for certain things like promotion and reassignment. Moreover, it would be unusual for an individual to remain in such an independent structure for too long. There is always the possibility that one will someday work for someone with whom he must "lock horns" as a defense counsel. Such pressures cannot be totally eliminated as long as defense counsel wear the uniform. This does not necessarily mean, however, that civilianizing the system would be better, for other problems may be created thereby.

Hereinafter referred to as "CMA" or "the court" in text.


See Cooke supra note 3.


authority must be reviewed thoroughly by the trial judge and may not contain conditions requiring the accused to give up rights other than those normally waived by plea of guilty.

CMA has also expanded its own supervisory role over military justice. West's disappointment over the court's failure to use its extraordinary writ powers should have been alleviated by the court's action in McPhail v. United States. There CMA held that it has authority to act to correct fundamental injustice in any court-martial, whether or not the court's ordinary appellate jurisdiction could ever extend to such a case. CMA has used its extraordinary writ authority to revise pretrial confinement procedures, to suggest broader powers of the trial judiciary over such matters as defense preparation, and has even hinted that it has authority to review administrative matters. CMA has also used it supervisory power to change other rules governing the system. It has, for example, changed military pleading requirements, the military standard for insanity, and the bases for pretrial confinement.

While descriptions of these and other recent developments in military justice may not generate the same interest as the lurid details of "command fraud," any serious study of military justice is incomplete without them. It is unfortunate that West has obscured an important subject by immersing the subject of command control in the froth (and stale froth at that) of sensationalism.

For over half a century the path of military justice has moved away from command control and toward a truly judicial system. A court-martial today is highly similar to a criminal trial in a federal or state court. The powers of a trial judge in the military have been equated to those of a federal judge, although there are differences, to be sure. The Court of Military Appeals has indicated its desire to enhance the authority and autonomy of the military judiciary as much as possible within the present limitations of the

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4United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).
4For example, a military judge has limited contempt power, see McHardy, Military Contempt Law and Procedure, 55 Mil. L. Rev. 131 (1972); a military judge cannot suspend a sentence which he adjudges, see United States v. Occhi, 25 C.M.A. Adv. Sh. 93, 54 C.M.R. Adv. Sh. 93 (1976); perhaps most significantly, a military judge has no power to act except when a court-martial is convened, and a court-martial can be convened only by an appropriate commander. See U.C.M.J., arts. 22-24, 39a. But see Stevenson, supra note 53, at 16.
Uniform Code of Military Justice. The court also on record as favoring certain amendments to the UCMJ to further increase the judicial role. Chief Judge Fletcher of the court has advocated that lawyers and judges administer military justice entirely, with but two exceptions: In the interest of military necessity, the Chief Judge would permit a commander to direct, after a preliminary investigation, that a case not go to trial. He would also permit a commander to exercise a clemency function after conviction.

West would go further then Chief Judge Fletcher and others who advocate the removal of the commander from any direct role in the administration of military justice; he would remove all military personnel from military justice. Because he feels that military lawyers are as much to "blame" for military justice as are commanders, West would turn the entire process over to civilians; the only features of the present system which he would retain are the Court of Military Appeals (already comprised of civilians) and the drawing of jurors from the military.

There are potential problems in such an approach which West either glosses over or ignores and which can be summed up in a single word: responsiveness. How responsive to the unique needs of military society would a system of justice administered entirely by civilians be? The military is a far flung, highly mobile society. Military efficiency as well as discipline depend upon the prompt adjudication of innocence or guilt. Would a civilian court system, even if devised to serve only the military, be able to fulfill these requirements, even in a relatively stable peacetime environment? Today, if troop relocation or a change in crime rates occurs, military lawyers can be relocated or reassigned with relative ease to handle the problem. Could the military expect the same degree of responsiveness from a civilian structure?

Practical problems like these must make one think twice about completely civilianizing the trial of military cases. It must be conceded, however, that these problems alone do not justify a separate system of military justice if the military cannot maintain a just system.

The real inquiry should focus on a more fundamental issue. West obscures this inquiry with his ad hominem attacks on commanders and military lawyers, but the fundamental issue which must be addressed is the

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57See Fletcher, supra note 3, at 6.


59There is an additional problem overseas. Some countries may not wish to permit civilian courts of the United States to operate on their soil. Transporting witnesses and defendants to and from the United States would be cumbersome and expensive. But see Sherman, supra note 7, at 1422.
relationship of the commander to the justice system. While commanders and lawyers generally approach their roles in military justice with honesty and integrity, the commander's overall role places undeniable pressures upon him and those who work for him. The commander is responsible for enforcing the law in his command. This inherent personal interest in the maintenance of order is antithetical to the neutrality and detachment normally expected of those who exercise judicial functions. The weight of the commander's authority is respected by all military personnel; that weight can exert a gravitational pull which can affect the judgment of others, even when that judgment is supposed to be exercised independently.

The purpose of the military justice system cannot be ignored, however. Like any system of criminal law, military justice is intended to enforce and reinforce the values and goals of the society to which it applies. Significant in the military's values is not only respect for the rights of others, or society generally, but respect for authority. Accomplishment of unpleasant or dangerous tasks depends on respect for those superiors who order that such tasks be undertaken. The military is, after all, an authoritarian organization.

The other side of this authoritarianism is the commander's responsibility for all that goes on in his or her organization. The operation of the military justice system, as an enforcer and reinforcer of the values desired by the commander, affects what goes on in that organization. The authoritarian structure in the military rests in large measure on the assumption that commanders know best the needs and capabilities of their organization and how to accomplish its mission. It cannot be forgotten that an effective fighting force is an unfortunate necessity in this world, without which the rights we all enjoy might be rendered meaningless. Looked at from the perspective of organizational efficiency, the commander's role in military justice is justifiable.

The commander's role in military justice must be evaluated in light of the unquestioned necessity for justice. A discourse on the nature of justice is hardly appropriate here. Suffice to say that human nature being what it is, the appearance of justice is critical to accomplishing justice. Essential to this goal is the diffusion of decision making to preclude arbitrariness and the allocation of it to decision makers with no direct personal stake in the result. The commander's role in military justice collides with these requirements.

The following questions thus remain: (1) to what extent should military justice be responsive to the commander's needs, and (2) what procedures are necessary to make it so? Answers to these questions are not scientifically ascertainable, but that is not to say the inquiry should not be undertaken. Indeed, the inquiry is ongoing, albeit in a less than systematic fashion. It seems fair to begin with the principle that whatever powers the commander retains he should have because they are essential to ensure that the needs of the command will not be ignored and he should have these powers only where there exists adequate assurance that the interests of the individual will be recognized.
and properly protected. Where such assurance does not exist, as where the commander's powers are nothing more than the vestigial remains of some ancestral limb, they should be amputated. The military justice system today is vastly different from the one of fifty, twenty-five, or even ten years ago, and has significantly changed in just the last five years. Rather than engage in the kind of careful, objective study necessary to the continuing of military justice, West opts to kill the beast and be done with it.