Yale Review of Law and Social Action

Volume 2
Issue 1 *Yale Review of Law and Social Action*

Article 3

1972

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Recommended Citation
No Listed Author (1972) "GI Justice in Vietnam: An Interview with the Lawyers Military Defense Committee," *Yale Review of Law and Social Action*: Vol. 2: Iss. 1, Article 3.
Available at: http://digitalcommons.law.yale.edu/yrlsa/vol2/iss1/3

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GI Justice in Vietnam: An Interview with the Lawyers Military Defense Committee

According to Catch-22, they can do anything you cannot stop them from doing. In a war zone, the range of anythings expands to diabolical extremes. The Lawyers Military Defense Committee originated to un-catch GIs snarled in court-martial prosecutions in Vietnam.

Their mission has made the attorneys of LMDC about as popular with the U. S. Command as General Giap. Early this year one of LMDC attorneys representing a black GI charged with murder argued that the GI was being deprived due process of law because the U. S. Command prevented the LMDC from operating effectively. Because the command allowed no military telephone lines to the defense group, the attorney claimed, he had to try 233 times to complete just four telephone calls to his military co-counsel in the case. The command also refused to grant the group mail and priority travel privileges. A full-colonel military judge hearing the attorney's claims said he agreed that the GI's right to civilian counsel had been abridged "but that's just a fact of life in Vietnam."

Since then things have gotten more pleasant for the LMDC. The difficulty of getting justice for servicemen in Vietnam remains. Several members of the group this fall discussed their difficulties and achievements in response to questions by the Yale Review of Law and Social Action. *The following is a transcription of their discussion.*

The participants are:

Henry Aronson, a graduate of the University of Wisconsin and Yale Law School who did civil rights work in Mississippi for three years with the NAACP Legal Defense Fund, Inc., and then for three years designed and directed the Manhattan Court Reform Project for the Vera Institute of Justice in New York City.

David F. Addlestone, a graduate of the University of North Carolina and Duke University Law School who served for three years in the Air Force Judge Advocate General Office and two years in the Public Defender Service for the District of Columbia.

Dolores Dede Donovan, a graduate of Stanford University and Stanford Law School, is a member of the California bar.

Joseph Remcho, a graduate of Yale College and Harvard Law School where he studied under Charles Nesson, president of LMDC, has worked with a law commune in Cambridge, Massachusetts. Remcho said he went to Vietnam with the group to find out "just what military discipline did require in a war zone and just how well military justice operates there."

Published by Yale Law School Legal Scholarship Repository, 1972

How did the Lawyers Military Defense Committee (LMDC) come into being?

Aronson During the spring and early summer of 1970, Peter Haggerty, a young non-lawyer, was actively working with servicemen stationed in the Boston area through a GI counseling center. He found a tremendous need for civilian lawyers to represent the center's clients, particularly those involved in cases with constitutional issues, conscientious objection, racial difficulties, and any related area which the military commands found particularly offensive. About this time, William P. Homans, Jr., an experienced criminal lawyer in Boston who was working closely with Haggerty's group, received a request from Vietnam to represent a black GI from Roxbury who was charged with premeditated murder. Haggerty's knowledge of the need for civilian lawyers for GIs in Boston combined with this cry for help from Vietnam, triggering Homans and Haggerty to think about GIs in legal difficulty in Vietnam, particularly when the difficulties raised issues of conscience, alleged "anti-military" conduct, or were related to constitutionally protected areas. GIs were without practical access to civilian lawyers.

Homans and Haggerty quickly enlisted the support of Anne Peretz, who had been actively involved in several military-related projects. Anne in turn drew on Professors Charles R. Nesson and John Mansfield of the Harvard Law School. A small amount of money was raised to finance a trip for Haggerty and Homans to Vietnam. Homans represented – and gained an acquittal for – the Roxbury GI. After the trial, he and Haggerty scouted the need for civilian attorneys in Vietnam and assessed the feasibility of practicing as civilians in a war zone.

They returned with a strong sense of need, optimistic that civilian lawyers could function in Vietnam. Within weeks Homans, Nesson, Mansfield and Peretz added Professor Norman Dorsen of NYU Law School and Professor Edward Sherman of Indiana Law School to their planning group, incorporated themselves into the Lawyers Military Defense Committee, obtained funding commitments to support a staff of four lawyers and an administrative secretary for one year, and hired a director. In addition to the Board of Directors another group of persons agreed to lend their names to LMDC and to help us if we needed it. They included Deans Abraham Goldstein and Burke Marshall of Yale Law School, Professor Louis Jaffe of Harvard Law School, Ramsey Clark, and John Pemberton, formerly director of the ACLU.

Staffing was completed by mid-October. I arrived in Saigon on November 1 with Susan Sherer; David Addlestone and Joe Remcho came out within weeks and Dede Donovan joined us in mid-spring.

Remcho It was quite obvious that the only people who could get good civilian representation in Vietnam were those who could afford the five or ten thousand dollars necessary to bring a lawyer over from the States, or who had committed an atrocity which had so much publicity value that a defense fund could be created or a lawyer would volunteer for the publicity. It was our feeling that a GI, who has the right under the Uniform Code of Military Justice (UCMJ) to have a civilian lawyer, should not be deprived of that right when he is in the worst position a GI can be in – Vietnam.

What kinds of cases do you handle?

Addlestone We have been defending GIs in courts-martial, representing them in discharge proceedings and, in general, giving them advice in any area where an attorney can be helpful. We have advised conscientious objector applicants, servicemen having problems with security clearances, and GIs seeking to submit Article 138 complaints – anyone having a legitimate complaint against the military in which the intervention of a civilian lawyer could have an effect. There is no general pattern.

Donovan A good example of our cases is one I handled recently. It involved a young man who had enlisted in the Air Force to learn how to be an Air Traffic Controller – he wanted to make a life career in that field. The Air Force suspected him of using heroin, but they didn't have any evidence that would justify a court-martial or even an Article 15.[1] So they suspended him from his job. A psychiatrist and a doctor examined him and said there were absolutely no signs of drug usage, but the Air Force wouldn't return him to his job without shuffling him through many levels of administrative procedures. Meanwhile, months were passing – since he wasn't permitted to work, he lost not only his proficiency rating but also the right to reenlist in Vietnam, which carries a tax-free bonus of about $1,000. We called General Clay to complain and within a few minutes the 7th Air Force SJA[2] had called us back.

That got things moving for a while, but then our client's command officer, who had previously sworn that our client would never be an Air Traffic Controller again, submitted a report saying that he had seen our client engaging in "unusual activities". We asked where and the commanding officer said it was confidential information – neither we nor our client could be told what was in the report.

At that point they shipped him back to the States – we gave him the names of some lawyers to contact, but haven't heard from him since. Of course, if the Air Force withdraws his certificate, he'll never be able to get a job in Air Traffic Control again.

Aronson No doubt an air traffic controller suspected of addiction must be checked. Yet, the misuse of doctors and administrative processes to cover an unsupportable result – lifting of the controller's "ticket" on nothing more than unsubstantiated suspicion – is virtually uncontrollable. A federal injunctive action would have been premature and would only have served to insure that the Air Force covered their ass. We can only hope that their zeal led to errors which can be picked up later in litigation.

What did you expect to do when you arrived in Vietnam?

Addlestone I know I expected to become involved in political cases.

Why aren't you getting First Amendment cases?

Addlestone Political cases are extremely rare in Vietnam for three reasons. First, there are few GI organizers here. Second, everyone is here for one year, which means everyone knows the date when they are going to leave. When a person first arrives in Vietnam he starts counting from "365", and he just does not want to get in trouble. He realizes that if he gets involved in political activities he can go to jail, and his tour of duty in Vietnam will be extended. Third, there is extensive drug usage, particularly heroin. When GIs become depressed, or when they are dissatisfied with their status, they find it easier to turn on to heroin than to turn on to political activity.

Remcho When you're a GI back in the United States, and you get out of line, commanders can threaten to ship you to Vietnam. In Vietnam, there is a similar threat available against GIs in rear areas. And, in fact, most GIs are not doing the fighting; there are ten support troops for every guy in the field. So in Vietnam there is always the threat of being sent to a forward area to fight.

Actually, there have been a couple of major demonstrations over here: one in Da Nang on Easter Sunday this year with about 500 people; the other at Chu Lai in June. Apparently the original plans were for political speeches in support of the Vietnam Veterans Against the War (VVAW). At the last minute, however, the Da Nang demonstration turned into a "smoke-in"; there were good people getting together, milling around on the beach, but no political activity. In

truth, the only people who have done overt political acts are the blacks. There was one demonstration in Chu Lai, several months ago, with seventy to eighty blacks demonstrating before the commanding general's house against what they felt was racial discrimination and improper pre-trial confinement of blacks. The Army sent a one-star general out to handle them, but there were no apparent results and no punitive action.

It's the blacks who are making what you call political statements, doing political acts. Most of these statements are not directed against the war but against treatment of blacks, and towards establishing black solidarity. I think it is clear, however, that opposition to the war among lower-ranked enlisted men throughout Vietnam is extremely strong. Very rarely will you find any expression of patriotism from anyone in Vietnam, especially enlisted men.

Donovan There are Vietnam Veterans Against the War organizers here in Vietnam, but it is very difficult for them to accomplish much.

Addlestone I think that all that VVAW is trying to do is urge GIs to write to Congressmen; they are not willing to go much further than that, even though they organized the demonstrations that turned into smoke-ins. However, some VVAW sympathizers – Navy enlisted men – whom we're representing are now circulating a petition to Congress to end the war. They've been getting mixed responses from the various commands: one person was actually apprehended for circulating a petition outside a post movie theater and another was beaten up by a career NCO. A few others have been harassed and intimidated for signing it.

Aronson The representation of these petitioners is a good example of the kind of work we do. The Navy men came into the office stating their desire to circulate a petition urging an immediate end of the war in Vietnam. They felt they could collect thousands of signatures but they were fearful of, and at all costs wanted to avoid, getting into trouble. Consequently, we provided them with conservative advice, explaining their constitutional and statutory right to circulate a petition *to Congress* providing they did so on their own time, that they did not use government property in reproducing the petition, and that they did not "demonstrate" in connection with collecting signatures. We then met with the Staff Judge Advocate of the Navy in Vietnam, informed him of the petition, and obtained his assurance that the men would not be bothered in their efforts. While it is true that there has been some harassment, it has been at low levels from hot-head NCOs acting on their own. The command has left the petitioners alone and the petition is making progress.

Donovan Of course, one possible response to the lack of political cases would have been for us to attempt to generate political activity by organizing. But we feared that if we did so – if we became visible as political activists – the South Vietnamese government would withdraw our visas.

Didn't you think you were going into Vietnam for big test cases?

Addlestone That's true, but I think we were also going in to help the individual GI as much as we could. We were and still are interested in constitutional litigation, particularly involving First Amendment rights. We haven't had test cases in this area because there is so little First Amendment activity here. We feel particularly close to the conscientious objectors, who get little other support here; certainly they don't get any from most chaplains and commanders.

I really don't think we've changed our views very much since we got here – we've just adapted to the kinds of cases that are available.

Addlestone The problem of the test case here is also that you get mooted out. Communication between here and the States takes so long that drastic changes in the case often occur before we can get it into federal court or to the Court of Military Appeals. Vietnam is not a good place for test cases, although we do have a few, and a few more are developing.

What kind of support has the U. S. military command in Saigon given to you in Vietnam?

Addlestone In Vietnam, if you are not attached to or invited by the military, you do not have privileges or access to military communications and logistic support, then you just cannot function. The U. S. command literally cut us off from all of this. They considered us to be a sub-

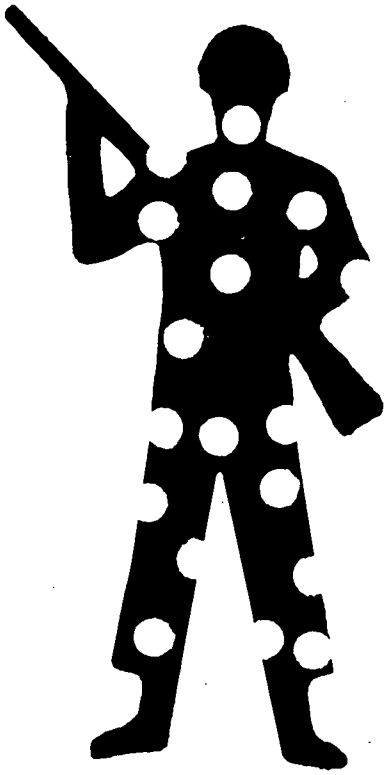
versive organization, in Vietnam just to cause trouble. They kept arguing that we were in private business and, therefore, that they did not have to give us anything; but in fact there are thousands of people in Vietnam who have minimal effect on the military effort and yet receive all the logistical support they need.

After prolonged negotiations, congressional intervention, threatened litigation, and just plain head-banging, some changes did come about. An extensive hearing on one case brought the forces of the press to bear on the issue; and the military judge, while he denied our motion, remarked that our ability to represent clients was being hampered by the lack of support. We now can fly on military airplanes. We are now allowed limited use of the Army postal system; we can receive in-country [3] mail from clients and judge advocate general (JAG) lawyers; but it has to be sent c/o Officer in Charge, Foreign Claims Division. We find even this objectionable since we do not want clients writing us care of Officer in Charge – it raises all kinds of questions in a client's mind about who is reading his letter and for whom we are really working.

We have tried to get a military telephone in our office. While we have access to a military line at the Foreign Claims office and we do receive messages there, it is inconvenient and not private. Not only is the phone located a block from our office, but there are always Army personnel within a few feet listening to what we say.

Aronson The Army's response to our arrival was a classic case of mismanagement coupled with a blatant display of the Army's disregard for servicemen's rights. As David indicated, we were denied access to all military transportation and communication facilities upon arrival. The Army, acting through the MACV (Military Assistance Command Vietnam) Staff Judge Advocate, General Abrams' lawyer, correctly assumed that if they could keep us off their aircraft, telephones, and off of their mail system, then we could not communicate with or see clients. The MACV-SJA saw his mission as one of protecting the Army from us. He actually told a friend on Abrams' staff that we were part of an international conspiracy which reached from Saigon to Stockholm via Hong Kong and Cambridge, and which had as its purpose the assisting of deserters in fleeing from Saigon to Stockholm. The idea is intriguing but not one we had or have contemplated.

We carefully documented the obstacles being put in our way; then in a pretrail hearing for a case where we were representing a GI, we set out these obstacles to support a motion to dismiss the charges of murder because the client was denied his right to counsel. The hearing was covered by the major media representatives ranging from the military newspaper *Stars and Stripes* to *Time* and the *New York Times.* As David indicated, the judge did not rule in our favor, but the press response coupled with Congressional inquiries, caused the U. S. military command to reverse itself and to grant us reasonably free access to needed facilities. Further, by blatantly blocking us from the only means of communicating with and seeing clients, the SJA quite unwittingly created the issue which gave us visibility and brought us to the attention of every JAG lawyer and thousands of GIs in Vietnam – the result the SJA most feared.



The attempt to closet LMDC further demonstrates the legal command's disregard of servicemen's rights. The commands freely transport jugglers, Bob Hope, boob shows and countless other half-baked entertainers, missionaries, car salesmen, USO types, Red Cross workers and heaven knows who else from the DMZ to the Delta, putting them up in VIP quarters, providing them with private planes when scheduled flights are not available, and otherwise affording them whatever the Army has to offer. On the other hand, civilian lawyers working in Vietnam at no cost to their clients were ruled ineligible for any kind of military support. I think the disparity in treatment says a lot about the sincerity of the military in professing that every soldier "has a right" to be represented by a civilian lawyer of his choice.

What have you done since you arrived in Vietnam?

Addlestone We have tried to set up some test cases. We have talked to a hell of a lot of people who come in our office just to have someone they can talk with on a person-to-person level. We have tried cases and been involved in administrative discharge proceedings.

We have been doing a great deal of work with conscientious objectors. This kind of thing seems to spread; we start working with one man from a unit, and frequently he'll bring in his friends. Many of the people here who would like to apply as conscientious objectors are afraid to do so since they think they are going to be sent to jail or to combat. And that is generally what happens to them. Apparently the Americal Division had a policy that if a GI indicated he was a conscientious objector, they would give him a two-week crash program and ship him out to the field without a weapon as a medic. That tended to discourage conscientious objector applications.

One battalion commander was asked if he had any conscientious objectors in his unit. He said, "Yes, I've HAD six: two are in jail and four are back on the line."

Donovan I have been dealing mainly with conscientious objectors. While the actual numbers are small, the number of conscientious objectors on our docket has quadrupled in the last few months. I theorize that the increase is directly related to the standdown of the war and the recent South Vietnamese "elections." As the absurdity of the war becomes increasingly apparent, more and more GIs are beginning to perceive that their problems with this war exist on a broader scale – that not only this war but perhaps all wars are equally pointless and absurd.

I have also tried a few cases involving illegal searches: the Fourth Amendment appears to be somewhat diluted here in Vietnam. Perhaps it's just because of the attack on the heroin problem, but it's also because of a feeling on the part of the military that rights against illegal search and seizure cannot be maintained in a "war zone." The Court of Military Appeals commented to that effect in the *Goldman* rehearing a few years ago. They might have a point in a real front-line situation (although from my point of view it would have to be a major emergency), but since most of our troops in Vietnam function in a support capacity, far from any combat, I see no reason why their Fourth Amendment rights can't be just as strongly protected in Vietnam as in the United States.

Remcho None of us has been able to try as many cases as we'd like since we have both travel and communications problems. Taking any case out of the Saigon area involves several days of travel, besides the work on the case. Once you are out of the Saigon area and working on a case, communications are so difficult that you can only work on that one case or something else in the same geographic area. You don't have anything like the flow you have in the States. When I was in Cambridge doing a lot of administrative cases, I could have forty or fifty cases on the docket at the same time. In Vietnam this is impossible.

Are there hard statistics on the cases you have handled since LMDC arrived in Vietnam?

Remcho Hard statistics – since November 1, 1970, we've talked to over 800 people, either in the office, in the Long Binh Stockade, or in the Da Nang Stockade.

We have assisted about twenty conscientious objectors with their applications. We have tried approximately thirty courts-martial. Quite a few cases were resolved informally, and many cases were handled by giving advice on a one-time basis or by writing a letter on behalf of the client.

Aronson Hard statistics do not begin to describe the work of the office. The Army, and the Marines while they were here, attempted to use their justice system to accomplish what leadership had failed to do – effect discipline, eradicate the drug problem, quell racial disharmony, and otherwise cure the massive ills which plague these services. Our biggest contribution has not been in the 30 cases we have taken through trial, but in the involvement in literally hundreds of matters where people have come to us as the only independent, non-military, non-establishment legal resource available to the 200,000-plus GIs currently serving in Vietnam.

Approximately 100 men have asked our advice on whether they should accept Article 15 punishment, which is non-judicial, informal, and not entered on a man's permanent record, for an alleged offense.[4] Article 15 has been used by some commands as a means of punishing men for conduct that did not happen or cannot be proven. A man has a right to turn an Article 15 down, but he then exposes himself to being court-martialed for the same conduct, if the command chooses to go ahead. We advised perhaps forty of these men to turn down the Article 15 – cases which we thought were totally unfounded or could not be proven. In no instance where we have advised that an Article 15 be turned down has the service commenced a court-martial. Most of these GIs would have taken the Article 15 as a lesser risk, rather than chance a court-martial, jail, and a permanent federal criminal record.

In other cases referred to court-martial by middle-level commands which arose out of bogus fact situations or overreaction to minor incidents, we have gotten senior commanders to drop the charges or lower the matter to an Article 15. In many other instances, we have referred clients we did not have time to represent to dedicated JAG lawyers. It is this constant surveillance coupled with the ability to intervene at a variety of levels in a variety of ways which takes up most of our time. It is impossible to keep meaningful box scores on this type of work.

Remcho Another thing we found useful is referring people to military lawyers. Military lawyers are like lawyers everywhere – there are medicore ones, real bad ones, and some very good ones. One of the things we've been able to do is refer GIs to military lawyers whom we know to be good.

Addlestone In some cases, what we have done is to be sure that the accused has been getting good advice from his JAG lawyer. Often the GI will not trust the military lawyer just because the lawyer is wearing a green uniform. We can give the accused confidence in his JAG lawyer.

How do you select cases?

Addlestone When we select a case, our basic criterion is: Does a civilian lawyer have something to add to the case? We prefer racial cases, cases involving command influence, First Amendment rights, or cases in which a significant legal question is raised – that is, cases in which victory would mean more than just victory for the accused. We try to discuss each case with the whole staff. We do not take any cases defending GIs where the victim is Vietnamese.

Donovan In interviewing we'll usually take the case involving a client who is politically interesting, whether he is anti-

war, in VVAW, or a black involved in some of the black activities here in Vietnam.

What is the status of military justice in Vietnam in comparison with the United States?

Remcho There is probably very little difference in the quality of military justice in Vietnam in comparison with what the military provides in the United States. I'm not saying this to praise the Army. I think the fact that there is very little difference between military justice in Vietnam and in the U. S. says some good things about the Army's willingness, and its obligation, to adapt military justice to wartime conditions. But it also says some things about the argument that aplogists for the military come up quite frequently; that because the military fights wars, servicemen must give up – and when I say servicemen, I mean service men and women – must give up the constitutional rights they would have as civilians.

The main difference between the U. S. and Vietnam is logistic; getting witnesses, the accused and judges together in time to try a case. Cases are delayed to some extent, yet the Government has shown a remarkable ability to get people together to try cases. It is very rare that transportation is not available to people who are traveling with court-martial priority – except sometimes us. Sure, everybody is in fatigues, you're in a hot courtroom, there may be helicopters overhead and you may on rare occasions have gunfire outside, but for the most part cases are tried close to the way they are tried in the U. S.

I think temporary confinement facilities here are deplorable, very often just a small box, eight by eight feet, with nothing in it but a blanket. But I haven't seen temporary detention facilities back in the States; I suspect in some cases they are not much better.

Addlestone The UCMJ does work in Vietnam to a reasonable extent. However, decisions here are made more hastily. In several instances we have spoken with convening authorities and charges were dismissed which had been hastily referred to trial. Also, pre-trial confinement is being abused. Commanders are concerned with having their command in combat-readiness; they want anybody who creates any kind of disciplinary problem out of the way. Most Army lawyers are reluctant – or have not thought – to raise issues of illegal pre-trail confinement. We have raised that issue and have been successful.

Aronson The logistical distinction between trying a case in the United States and in Vietnam referred to by Joe is far-reaching, particularly in complicated cases which do not go to trial for three to six months after the alleged criminal act. In "normal times" in Vietnam, 8% of the troops rotate every month. With the reduction of forces in Vietnam, that figure is often tripled. Thus 20 to 25% of the troops leave every month and many witnesses are simply lost. We have not tried one major case where both prosecution and defense has not been hurting for witnesses. The distinction is that the prosecution is a bit more diligent about getting their tracking and interviewing back home. Couple this disparity in resources with fragmentary leads to witnesses like "Brother Smily" and "Big Boy" and you find yourself at a considerable disadvantage.

Remcho Sure, the problem in getting witnesses from the States is enormous. I was referring to in-country travel, but I agree with you about the witness problem, once a man has gone home. We can get guys, if we can show their testimony is necessary. My problem is with witnesses I have never talked to and cannot show how important they might be at trial: leads I cannot explore.

What is the sorest spot in military justice in Vietnam?

Addlestone The system looks the worst when non-legally trained individuals make arbitrary decisions in an attempt to discipline GIs, rather than to seek justice.

Within the framework of the UCMJ, the role of the Staff Judge Advocate is a crucial one. He is the legal adviser to the convening authority. He is usually a major or lieutenant colonel, and his commander is a general. The general writes the major's efficiency reports. Naturally, the SJA is going to base his legal recommendations on what he thinks the general wants to hear. If there is a strong SJA who will stand up for proper judicial proceedings and who will demand consistency in the handling of cases, there is an environment where the UCMJ works very well. On the other

hand, if you have a weak Staff Judge Advocate, there is a deplorable situation. Of course, that could occur anywhere, but commanders in a war zone are more concerned with eliminating disciplinary problems than with justice.

A problem in Vietnam is the tremendous case load that the good JAG lawyers are carrying. They have a lot of pressure from their superiors to get the cases moving, to stipulate to testimony, to accept depositions, and not to go all the way with cases. The really good defense lawyers here naturally get more requests from accused,[5] and some of them are carrying 30 to 40 general courts-martial. They simply do not have time to do good work.

Remcho A commanding officer doesn't have to tell a JAG lawyer to make a stipulation, or not to request full courts all the time. If a colonel or a general lets the word filter down that he is worried about the case load, JAGs are just going to feel that pressure.

Addlestone Many of the military lawyers here are not even JAGs; they often have an infantry commission. On occasion these people have been threatened with assignment to the field if they did not cooperate with the "program" – or they have been made prosecutors rather than defense lawyers.

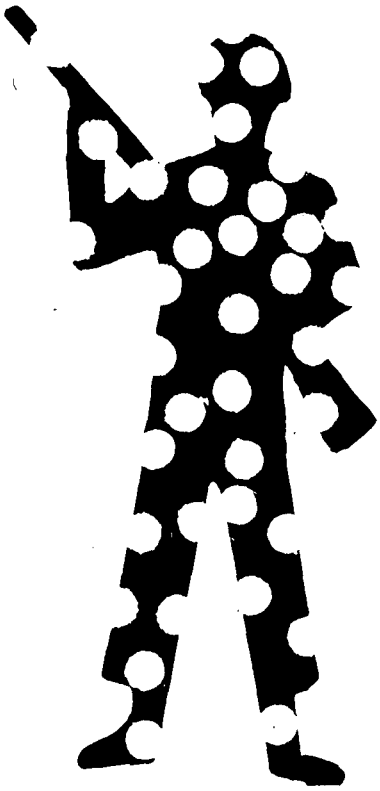
Remcho There are pressures on judges, as well as on staff judge advocates and counsel. More than one judge has been told that his sentences are too light, and that discipline suffers.

One very special case is that of a captain, a special courts-martial judge, who was just sent from Vietnam. He was known for giving what commanders called unduly lenient sentences. Months ago he was banished from the Americal Division at Camp Eagle. He had been reprimanded on at least one occasion for his sentences by a senior military judge. Just two months before he was due to leave Vietnam, he was informed that because his sentences were light he was being moved out of I Corps, in the northern area of Vietnam near Da Nang, to Long Binh, where there were three or four special courts-martial judges. Presumably the effect of his lenient sentences would be diluted by the sentences of other judges.

This is not an uncommon occurence. Marine Corps lawyers told me that around the turn of the year, a large number of Marine captains who had been judges in Vietnam were sent back to the States and taken out of judicial positions because their sentences were too lenient in comparison with majors and lieutenant colonels who were judging cases. Now the trend is towards having just majors and above act as judges, or senior captains who have shown career potential and can be expected to conform to the needs of the command.

Aronson David's point regarding pressure was made this week by no less an authority than Major General George S. Prugh, the recently appointed Judge Advocate General of the Army. He was quoted in the Army newspaper, *Stars and Stripes,* as believing that the biggest problem in military justice is that it is "too darn slow." He went on to say that in Vietnam witnesses leave early and lawyers concerned with doing a good job will try even a special court-martial "as if it were going to the Supreme Court." I only wish that this was true. But his message is not lost on his subordinates – don't work too hard on your cases.

Addlestone There is another interesting thing to



credit to the military in Vietnam: when an offense becomes common it starts to descend on the scale of seriousness. For example, marijuana is generally accepted now because marijuana is used by almost everybody. Rarely will someone be court-martialed for a marijuana offense alone. It is almost certain to be an Article 15 offense here, yet in the States it normally would warrant a special or general court-martial.

Remcho Now with the heavy use of heroin, men are sometimes getting off with non-judicial punishment. A man was in to see me yesterday who offered an Article 15 for possession of two vials of heroin; this is something that two years ago would have netted a two or three year sentence. And a military lawyer from the Americal Division told me that in July six or seven commanders were offering Article 15s for possession of heroin.

The Army realizes how common heroin is, yet you get both extremes. Some commanders offer Article 15s, while others take off all the wraps and conduct blatantly illegal searches for heroin. And nobody is going to the source of the problem.

Donovan Here is a letter that a battalion commander just issued about heroin:

"As of this date I am declaring war on drug abuse in this Battalion. In the last five days, in a series of seizures, I've confiscated 112 vials of heroin – enough to make things a little tight. Things are going to get a hell of a lot tighter before the problem is satisfactorily solved. There will be more shakedowns and inspections; the flow of traffic in and out of the compound is going to be drastically reduced. Officers and senior NCOs are now authorized to conduct unannounced searches of any man on this compound.

As I turn down screws more and more, you're going to start hurting. If I have to hunt you down and catch you, and you refused my help, I will put you behind bars as fast as I can for as long as I can. The maximum for possession of 'smack' is 10 years in a federal penitentiary, and I will bring the 'max.' I don't want to hang anyone but *I will* solve this problem. Help me solve the drug problem by helping me get the monkey off your back."

What is the solution to the heroin problem?

Remcho I am not sure what the solution is, other than just to get out of Vietnam. What really starts heroin usage here is this total boredom, being shut off from the rest of society, not really fighting a war. Most people are rear troops and that is where most of the addiction is. In addition, I doubt that any honest attempts have been made to do anything about cutting off the flow of heroin. Even now most of the drug raids by Vietnamese are just publicity stunts. The powers in the government of South Vietnam apparently have a financial stake in seeing that heroin continues to flow. That's just an undocumented feeling.

Amnesty programs are apparently not very successful. GIs, particularly blacks, find it hard to trust the Army's promise of immunity. Although the government does not prosecute persons who go on amnesty or flunk urinalysis tests, reports of drug use often find their way into permanent records of one sort or another. There are urinalysis tests, now given to everyone leaving the country and to in-country units at random, through a program known as "Operation Golden Flow." A user can expect little in the way of help. A week or two in an amnesty program will do little good, especially when drugs are often available within the amnesty house.

One of the few effective programs to get GIs off of heroin is run by SP4 Henry Rollins at Long Binh. Rollins, a black, and his counsellors appeal to the

racial identity of blacks: "If you're on skag, you're a nigger. You've got to get off skag if you want to even try to be a black man." It's tough medicine, but he has made it work.

Donovan A lot of our clients who are on heroin have told us that the reason they have switched is that the Army was cracking down so hard on marijuana that they turned to skag because it was non-detectable. Army officers could smell marijuana, but they can't smell heroin. GIs will smoke a heroin cigarette right in front of an officer and he never knows what's happening.

Aronson One client said he switched because "grass is loud, man, you can smell it a mile away."

What about racism in Vietnam?

Addlestone You see it everywhere! A black told me of going to an Inspector General (IG) officer to complain of racial discrimination in his Air Force unit. The IG opened the conversation by asking the black GI, "Just how many colored boys do you have in this unit?"

Donovan One of the conscientious objectors, a black man, has met with an incredible amount of hostility and harassment. He has been told that if he will withdraw his papers, they will give him a decent job, but if he won't withdraw his papers, he will end up being sent back to perimeter duty and will be given the worst possible job in civilian life, if and when he gets out, because he is a conscientious objector.

Remcho Of course you see gross examples, but it's evident in subtle but nevertheless crucial situations.

One field refusal[6] that I had involved a black GI who has an incredibly bad home situation. His wife had walked out on his kids and he spent nine months trying to get a reassignment or an emergency leave to get back to the States. Finally, as a desperation measure, he refused to go to the field. I called as a hostile witness in that case a white chaplain who on several occasions had discouraged the GI and given him wrong advice about regulations, making it almost impossible for him to get back to save his family.

The GI was convicted of refusing to go to the field. Then several days after the trial his hardship discharge was finally approved and his case was brought to the attention of authorities. But the conviction will stay on his record.

What about refusals to fight or bear arms?

Addlestone Field refusals in Vietnam are handled as informally as possible. The commanders talk with the men, and if they will go back out in the field, they usually will not be tried. We have been involved in seven refusals, almost all involving conscientious objectors. One GI that Henry worked with had actually filed as a conscientious objector and was being sent to the field; he persuaded the convening authority to dismiss the charges. In my cases, the GIs had not yet filed. They refused to bear arms and were convicted.

Soldiers in Vietnam have been creating "space" for themselves by "fragging" officers and enlisted men, by disobeying orders, by creating their own world with drugs, by emphasizing racial pride – has the Army responded with any new policy towards giving soldiers in Vietnam more "room"?

Remcho One situation comes to mind where there appeared to have been a calculated attempt to create "more room," as you say. Apparently what had happened was that a commanding officer had been tolerating marijuana for several months; then he suddenly decided to crack down and gave some GIs Article 15s for possession of marijuana. Several GIs got together and decided to "frag" the area – they set off six live fragmentation grenades and a couple of people were hurt, but not seriously. This was somewhat typical. What they try to do is warn superiors by setting off "frags."

Commanders are not operating under the assumption that there will be a plot to get them if they get tough with their men, but they are all particularly aware that "fragging" exists. They tend to hold back just a little because they are afraid of someone getting out of hand.

Addlestone It is the general feeling that "fraggings" are spur-of-the-moment decisions and not calculated attempts to injure. "Fraggings" usually serve as a "warning." The real killings occur

when someone has been pushed to his limit; however, the level of tolerance and civilization erodes rapidly here.

Donovan There are stories that circulate about officers sleeping with their guns beneath their beds and having guards posted . . .

Addlestone . . . and of first sergeants keeping hostages or playing musical beds.

Donovan We are sympathetic to the frustrations that lead to an act of "fragging," although we can't condone throwing a live grenade at someone.

How is plea bargaining used in Vietnam?

Addlestone Too often. It's an integral part of the military process everywhere. Plea bargaining is widespread except in the Air Force, which does not sanction plea bargaining.

Aronson There are many instances where the accused is being well represented and the case ends in a negotiated plea. The problem occurs when plea negotiation is a cover for laziness. It's a hell of a lot easier to plead a client than to prepare for his defense. We have represented many troops who were innocent and represented by military lawyers who wanted to plead them guilty. The most blatant case involved a soldier whose JAG lawyer got his client a "deal" for a plea to attempted murder. Joe had the case dismissed at a preliminary hearing.

Do you think LMDC lawyers are bargaining from strength?

Addlestone Yes. Generally, the Staff Judge Advocate is afraid of having to put up with an aggressive civilian lawyer; he knows we are going to raise more issues than a JAG lawyer will and that he is going to have to review a complex case. In many instances, civilian lawyers are able to get a better bargain.

What about the Calley trial and verdict? What has been the effect in Vietnam?

Remcho Most GIs in the field were sympathetic to Calley. Many felt that once you are out there shooting, you shouldn't have to worry about people looking over your shoulder all the time.

But I do not think very many people related the trial to a man's right to disobey an unlawful order. There is an eight-hour course on military justice and the Geneva convention which military lawyers are required to give to all troops. Often, however, they face hostile audiences and it is not uncommon for the course to be a "fifteen minute special." Most JAG lawyers felt the verdict was probably supported by the evidence and that Calley should be punished.

Aronson Not so the guards at the Da Nang Stockade. They were most proud of a large sign proclaiming "Free Lt. Calley" posted conspicuously in their office.

Addlestone I have heard a few soldiers say they are aware they do not have to obey illegal orders. In fact, the three conscientious objectors that we just finished defending sincerely felt that the order they were given was illegal. Many GIs who are opposed to the war talk in terms of its illegality.

What risk does a GI take when he disobeys an order he thinks is illegal?

Remcho I have not spoken to anyone who thought he was going to be shot for disobeying an order. There is a large amount of disobedience of minor orders that goes on without punishment. If a GI takes a public position, disobeying an order in front of a lot of people, he is maximizing his chances of being punished.

In point here, the UCMJ provides a maximum penalty of five years imprisonment and a dishonorable discharge for disobeying orders of a superior officer. It has been our experience that most disobedience of orders cases – unless they involve someone like a conscientious objector or political activist – go to special courts-martial, which can give a maximum of six months confinement. In fact, very few of the special courts-martial award maximum punishment even if a GI has disobeyed an order to go into the field.

But I still think soldiers take the matter seriously; it takes a lot to get them to disobey an order to go into the field.

Aronson Also, there are a number of well-known ways to which orders can be ducked. One example is "walking the map," in which a leader told to move his unit from A to B acknowledges the order and later reports to his superior that the order

has been carried out. In fact no one moved. A second and more popular avoidance scheme is to respond to a radioed order: "You are coming through broken," and then, "We cannot read you," when in fact the signal is loud and clear.

Is "winding down" the war reducing your operations?

Addlestone No, not at this point, because leisure time and boredom lead to more offenses. Also, many GIs simply refuse to accept the authority responsible for this war. The work load is always beyond our resources; we could have handled a thousand cases. Many GIs want civilian lawyers.

Can LMDC hire more lawyers?

Remcho The four lawyers now in country will be leaving during November. We will be replaced by Howard DeNike of San Francisco and Edward Kopanski of Philadelphia. Susan Thorner, who has just finished her first year of law school, will work with them.

LMDC has raised some of the funds necessary to continue operating into the next year. We are counting on further help from foundations and private individuals. If anyone is interested in making contributions or handling stateside appeals of cases raised in Vietnam, he or she should contact Charles Nesson at Harvard Law School.

As a policy matter, what limitations does LMDC have on its own operations?

Addlestone The only limits are that we do not get involved with overt political activities because we would lose our visas and that we are not accepting cases defending GIs where the victim is Vietnamese.

Remcho One of the reasons that we do not feel bad about not taking cases involving Vietnamese victims is the so-called "mere gook" rule. In cases tried in Vietnam you'll find that someone convicted of shooting a U. S. officer or GI may get life or 30 years, while someone accused of killing a Vietnamese will get only a short sentence, if he is convicted at all. The Army's ability to distinguish between the life of a Vietnamese and the life of an American is somewhat staggering.

For example, there was a race riot in Qui Nhon several months ago. A GI was accused of having shot a twelve-year-old boy through the head with an M16 that blew the back of his head off. Now if the GI had shot another GI with an M16, it would have gone to trial as murder. This one went to a special court-martial for something like aggravated assault or negligent homicide. The most the GI could have received was six months. He doesn't need our help.

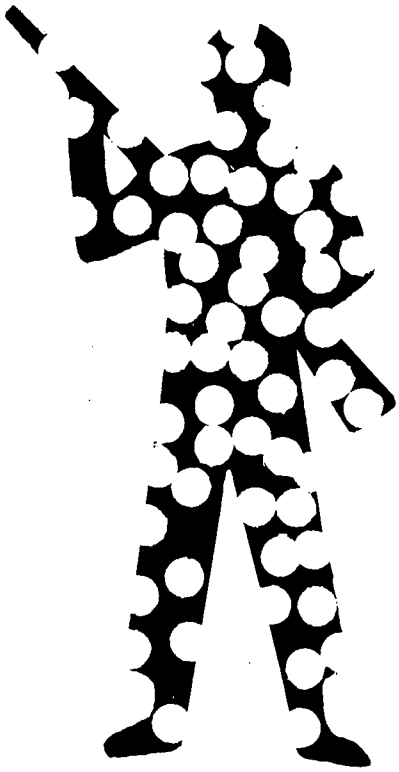
Donovan There also seem to be "mere nigger" and "mere pot-head" rules in operation in Vietnam.

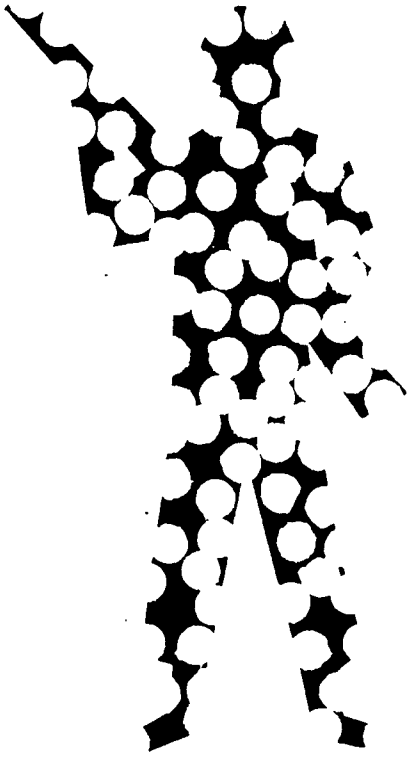
What would be the potential of LMDC if it had more resources and more lawyers?

Addlestone My personal opinion is that there are not enough organizations in the States that exclusively handle military cases. And if they do military cases, they have to do them on a fee basis or by dividing up the fee cases. I would like to see an organization such as LMDC expand and have local groups of lawyers on salaries located at all the large military installations in the States.

Aronson Perhaps a more important question is, "Why are there military lawyers?"

Military and justice are basically





incompatible. Commanders have little time and less patience for the Fourth Amendment and the right to counsel, particularly in a place like Vietnam where they are, to the man, attempting to make their reputations as field commanders. Being a crusader for the Constitution or justice is not a recognized route to success in the military. The commander looks to his JAG subordinate as a necessary evil, found on the same line on the organization chart, and often equated with, chaplains. A general once commented to me that JAGs were "the last guys I want to drink with and the first guys I want out of the way when it gets thick." He went on to say that "no lawyer worth anything would stay in the service anyway."

Given the immense tension between the necessities of the military and the requirements of elementary justice, justice has and will continue to come out on the short end as long as it is entrusted to the care of the mediocre lawyers who, with few exceptions, staff the career JAG Corps. The tension and the mediocrity, combined with the desire for promotion within the JAG ranks, has given rise to a prosecutorial system. If you want to make it as a Staff Judge Advocate, you support the prosecutors to the hilt, let the young inexperienced defense lawyers fend for themselves, and above all don't make legal waves. This results in the young military lawyers who value their independence as lawyers getting out. Again, there are exceptions, but in the main the JAG career corps ranges from mediocre to incompetent.

This incompetence is frightening and leads me to question why military law need be left to men in uniform. Perhaps LMDC's biggest contribution will have been the demonstration that civilians can practice military law in a war zone – and if here, why not everywhere. Lawyers who are just lawyers, who do not have to report in to the men they allegedly advise, but who are responsibile only to their clients, the courts they practice before, and themselves. My work with LMDC leads me to seriously question the need for uniformed military lawyers.

How would you define the role of the civilian lawyer in Vietnam?

Addlestone LMDC brings different backgrounds into the system; the young JAG officer's only experience has been in military courts. I think we do have an effect on military justice by bringing in new ideas and challenging accepted injustices. We have the ability to go into federal court and also to draw on more brain power to assist us in appellate cases. Most importantly, we offer a friendly ear to those GIs who just want to talk with a sympathetic civilian.

An example of what we can do relates to three of our clients who are now in post-trial confinement. They wanted to read some literature which contained a variety of points of view on violence so that they would be prepared for their CO hearings. We took some books to the stockade commander, two for sexual content and six for political content – including *Points of Rebellion* by Mr. Justice Douglas. We were told very plainly that political literature is not allowed in the stockade because many of the inmates are not educated and they might believe what they read. We filed suit and the books were admitted.

Remcho That reminds me of a story about the MACV legal library. MACV is the only

Army library in Vietnam with federal law books, although there are Navy and Air Force libraries with federal books. This is outrageous when you consider all the things that are brought into Vietnam – truck-loads of ice cream, California lettuce and grapes, and so forth. It is too bad the Army cannot bring in three or four thousand dollars worth of legal books to Da Nang for the lawyers who serve the whole northern part of the country. If you are a JAG officer in Da Nang, all you have is the Court of Military Review reports, the military law books, and maybe a couple of text books.

At any rate, we had a question which raised some very serious *Miranda* problems which required federal research and I asked to use the MACV library. A warrant officer said it was only open to people who worked in the MACV complex. These are people who have nothing to do with criminal justice, so I asked, "What about a JAG from up north who comes down to look something up?" He replied that it was their policy not to let JAGs use their books because the JAGs might get different ideas than their chief legal officers back in Da Nang. I assume this is an unofficial view. MACV has since permitted us limited access to the library.

Military justice still sounds like injustice. Is there a new route to justice in the military?

Addlestone I am not convinced that military justice can be equated with injustice; I think it is just as bad as any of the justice systems in the United States. Juries in both systems are drawn from groups that are conviction-minded – the career officer here is not much different from the middle-class jury sitting in judgment of the ghetto black.

Donovan The thing that is most unjust about the military system is giving men federal convictions for purely disciplinary offenses; for instance, a federal conviction for disobeying an order, for being AWOL, or for sleeping on post. I find that absolutely incredible.

Addlestone JAG officers should be able to act as real defense lawyers and more civilian lawyers should become involved and start challenging some of the accepted abuses. Also, legislation is needed to eliminate the position of the convening authority and the Staff Judge Advocate, and to give military judges the same powers held by the judges in federal district courts.

Remcho I would like to see military judges appointed as civilian federal judges under Article III. It's also essential that they be given All Writs power. And the incredible provision permitting a commander to overrule a judge on a question of law, though rarely used, has got to go.

Another crucial change must come in the composition of military courts. The convening authority, who is supposed to personally select courts, usually delegates the job to a personnel or legal officer. The officer almost invariably chooses a court with a lot of senior officers. When enlisted men are requested by the accused he usually gets a court with E-7s, -8s and -9s [7]. In short, a lower-ranked enlisted man has almost no chance of getting any peers on his court. And most accused are lower-ranked enlisted men, usually black. If courts were randomly selected so as to include lower grade enlisted men, I think you would find a tremendous increase in the quality of military justice and the respect enlisted men have for military justice.

Military lawyers as a whole tend to try their cases before military judges sitting alone. Statistics made available by the Appellate Division of the Army Judiciary are staggering. From October to December 1970, for example, more than 85% of general courts-martial and 99% of special courts-martial adjudging bad conduct discharges were tried before a judge alone.

This is largely because full courts are "stacked" with senior officers. Another reason is pressure from Staff Judge Advocates to get cases tried quickly; cases before full courts take at least twice as long as those tried before a judge alone. Finally, many JAGs are inexperienced and therefore unwilling to get into the complexities and evidentiary problems of trying a case before the military equivalent of a jury.

We have tried most of our cases before full courts and have had pretty good results. I think we have had the only all lower-ranked enlisted courts in Army history. In one case were were able to convince an enlightened convening authority to put lower-ranked enlisted men on the court because the accused – two black members of the Black Brothers

United on Whiskey Mountain – felt they would be railroaded if they were tried by all officers and senior enlisted men. The convening authority appointed four Specialist 5s (E-5s) and four officers. We managed to challenge all four officers and wound up with three enlisted men – one black E-5 and two white Specialist 5s.

In a second case which I think is highly significant, a convening authority at Long Binh agreed to appoint a randomly-selected court. By choosing men by computer at random and without regard to rank, and then invoking his discretionary power to remove those he felt were unqualified, the convening authority came up with a panel consisting of a major, a captain, an E-7, three E-5s and three E-4s. After voir dire and challenges, the final court consisted of two E-4s and three E-5s. They acquited SP4 Henry Rollins of assaulting a sergeant major. Although the UCMJ should be amended to require some form of random selection, the Rollins case shows that courts can be randomly selected using the current UCMJ.

In agreeing to random selection, the convening authority said he expected some decline in the number of convictions and severity of sentences. He felt this would be offset by increased troop morale and respect for military justice. I agree. It is time that commanders stop using the UCMJ as a disciplinary tool and concentrate instead on earning the respect of their men. The result will be an increase not only in the justice afforded an accused, but also in the morale and discipline of armed forces.

Addlestone The issue of pre-trail confinement has been a big problem. Recently I found the right case where the pre-trial confinement was clearly illegal: the case where a man was confined for possession of heroin, and to prevent future sale of heroin. The *Manual for Courts-Martial* is very vague on why a man can be placed in pre-trail confinement, and the military often uses pre-trail confinement for preventive detention. The local regulations in Vietnam limit pre-trial confinement (among other things) to cases involving violence – much like the new D. C. crime bill. And any reasonable reading of this limit would not include possession of heroin, yet there have been hundreds of people put in pre-trial confinement this year for sale and possession of heroin.

We requested an immediate hearing before a judge on this issue; it was granted and the chief judge of the country ruled this type of pre-trial confinement was illegal. He now had power to order release, but the command released my client some five hours after the judge's ruling. Subsequently the regulation was changed.

A lot of work could be done in this area, and if someone would take a proper record to the Court of Military Appeals, the issue of pre-trial confinement could be clarified. To my knowledge the issue of whether a hearing before confinement is constitutionally required has never been raised.

The major point of this last discussion is not the specific issue but that there is a great need for civilian lawyers to become involved in military law. It is ridiculous to ignore the effect of 100,000 courts-martial a year. These are criminal prosecutions and result in federal felony convictions in most cases. The JAGs certainly do not have the time or the experience to reform this system. Civilian lawyers could add a great deal to improving military law and to insuring that military dissidents remain free to carry on their work.

1. Ed. – a non-judicial proceeding, see Fuller, *Signin' Them Papers,* this issue.

2. Ed. – Staff Judge Advocate General, the legal advisor attached to each senior military command.

3. Ed. – Mail sent from within South Vietnam.

4. Ed. – See Fuller, *Signin' Them Papers,* this issue.

5. Ed. – An accused has the right to request any JAG who is "reasonably available."

6. Refusal to fight or bear arms.

7. Ed. – Senior enlisted men.