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Prosecutorial Discretion: An Overview of Civilian and Military Characteristics

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When General John D. Lavelle confessed to disobedience of orders prohibiting certain air strikes in North Vietnam and to falsification of official records as to the raids, he was retired from the Air Force, with less rank than he had while on active duty, but with no loss of pay. Although one commentator on the case has asked: "How on earth is any soldier to be held to orders if Lavelle goes free?", President Nixon described the "punishment" as "fair." When Daniel Ellsberg allegedly disregarded the government's "top secret" classification of the Pentagon Papers, he was indicted on fifteen counts, including a charge that he conspired to "defraud" the nation by obstructing a lawful government function. Since the charges carry an aggregate punishment of 115 years, the government will, presumably, in the event of conviction, urge, as "fair," imposition of a long prison term. Reportedly, in random street interviews many people have indicated that they "approve of [Ellsberg's] . . . disclosure of the Pentagon Papers." To these people, conviction and imprisonment of Ellsberg would undoubt-

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edly be “unfair.” Both incidents have evoked heated argument about morals and national honor. Among other points of dispute, the different treatment accorded Lavelle and Ellsberg has provided grist for the mill of controversy between political scientists and lawyers, as to whether all litigation is “a form of political action.” Whether one agrees or disagrees with the view that political considerations and public, social and economic issues color every judicial proceeding, military and civilian, or with the government’s disparate action toward General Lavelle and Civilian Ellsberg, an understanding of the general scope and mechanics of prosecutorial discretion may contribute to better understanding of the process, if not the merits, of disposition of actual or suspected criminal conduct in the military and civilian communities.

A comparison of systems necessarily involves a subjective judgment in the selection of points of comparison. An outstanding critic of the Federal Bureau of Investigation under J. Edgar Hoover, for example, ascribed an empire-building complex to Mr. Hoover because the Bureau was, in the critic’s judgment, overstaffed. On the other hand, pointing to the ever-increasing burden of investigation imposed upon the Bureau, Professors Harry and Bonaro Overstreet have judged the Bureau’s staff to be “very close to the line beyond which it would be intolerably too small.”

The selectivity of one observer of military criminal law and its administration can be perceived in the title of his book, Military Justice Is to Justice as Military Music Is to Music. Oppositely, after years of service on the United States Court of Military Appeals, the civilian “Supreme Court” of the courts-martial system, the author perceived the “explosion of constitutional doctrine” in the civilian criminal courts during the period of the Warren Court as bringing the civilian practice “more in line with that in effect in the military system” and as a “catching up” of the civilian community with the military in the “effective guarantee of constitutional rights.” Subjective distillation of qualities can make com-

parable the incomparable; even chalk and cheese can be suitably compared if one refers to the chalk-like texture of the cheese or to its chalky color. One who writes from the vantage point of participation is expected to "tell it like it is," but the expectation may fall short in the performance, because of the human tendency to pronounce the product of one's own work good, without actually seeing, and, in the seeing, judging that it is good. Years ago, I recorded my judgment that the courts-martial system under the Uniform Code of Military Justice has made an irreversible turn-about from the "drumhead" and "can truly be regarded as an integral part" of the regular judicial system. The present broad-brush comparison of prosecutorial discretion in the civilian and military criminal justice systems is a reaffirmation of that judgment.

**Absolution from Crime**

MyLai, an obscure hamlet in the Republic of South Vietnam, and Lieutenant William L. Calley, an obscure junior officer of the United States Army in South Vietnam, conjoined in an incident that has called into question the American posture in Vietnam in general, and, in particular, whether, as William F. Buckley, Jr., has put it, "the American military has become so calloused and cruel and irresponsible" as to make MyLai occurrences "altogether work-day phenomena." Lieutenant Calley was convicted by an army general court-martial of the premeditated murder of twenty-two civilians. Following the conviction, at President Nixon's personal direction, Calley was removed from the stockade, where he had been confined by the military commander, to a personal apartment on post. The military prosecutor called the President's act an "intervention [that] has . . . damaged the military judicial system" and exposed it to the "criticism that it is subject to political influence . . . [contrary to the] fundamental precept of our judicial system that the legal processes of this country must be kept free from any outside influences." Assuredly, the President's action was an "intervention" and an "outside influence," but was it, as the prosecutor implied, unlawful, either in civilian or military law? The President's probable motives are not determinative of his constitutional and statutory power to intercede in regard to an offense against the United States.

7. Id. at 1258.
Article II, § 2 of the United States Constitution vests in the President the “Power to grant Reprieves and Pardons for offenses against the United States except in Cases of Impeachment.” Commonly, pardon is thought of as an act of absolution of the legal disabilities consequent upon conviction. Lieutenant Calley’s prosecutor implied that presidential intercession in any criminal proceeding in advance of conviction is wrongful. From that standpoint, the Administration’s refusal to investigate a suspected criminal act can be described, as it was described by *Life* magazine, in a recent article, as “tampering with justice.” However, the scope of the constitutional power to pardon is not so limited.

The pardon power does not require a conviction to make it operative. It has vitality at all times. It can be used to bar investigation of suspected criminal conduct, and it can be used to bar prosecution of a known crime. As early as 1807, President Jefferson granted a pardon to a witness before a grand jury inquiring into the allegation of treason against Aaron Burr. In modern practice, an executive grant of freedom from prosecution for criminal conduct to obtain testimony is not considered a pardon, but a grant of immunity, and the source of the grant is not the constitutional power of pardon but a statute by Congress. However, other means by which the executive department can bar prosecution for federal offenses, such as refusal to sign an indictment by the grand jury, or abandoning prosecution of a signed indictment, are still expressly related to the general pardon power. The fact that currently a statute confers prosecutorial discretion to United States Attorneys to grant immunity to witnesses does not dilute the President’s pardon power. Although a divided United States Supreme Court upheld immunity grants by Congress as not infringing...

10. In Upshaw v. McNamara, 435 F.2d 1188, 1191 (1st Cir. 1970), the Court held that the Commissioner of the Boston Police Department could, “as a matter of policy, refuse to appoint [to the police force] all whose pardons were granted for grounds other than innocence.”


ing upon the President's power, recognition of the legislative authority does not diminish the executive power.

Anticipated public reaction, partisan political considerations, or even the dictates of American relations with foreign powers can, of course, deter the President from exercising the pardon power, in whole or in part. It is most unlikely, for example, that any President serving in the next decade would, without Congressional support, or overwhelming public support, grant amnesty to dodgers of the draft or deserters from the armed forces during the period of direct American participation in the land war in Vietnam. The influence of these practical considerations does not delimit the President's legal authority. Whether a vocal or silent majority or minority approved President Nixon's intervention on behalf of Lieutenant Calley may be debatable; but that the President possessed the constitutional power to intercede is undeniable.

Conception of a court-martial as an instrument of command might support a conclusion that misconduct in the military is not an "offense against the United States" within the meaning of the pardon power. Whatever its theoretical underpinning, the conception has been so eroded by the application of constitutional principles to the military justice system as to eliminate it from serious consideration as a restriction on the pardon power in respect to offenses triable by courts-martial. The Court of Military Appeals has held that a court-martial is a criminal proceeding in the same sense as a prosecution for a federal crime in the United States District Court. The President has also asserted authority to pardon for innocence a Marine Master Sergeant convicted by general court-martial of stealing government property. Precedents of principle and practice, therefore, leave no doubt that an offense properly triable by court-martial is subject to the pardon power of the President, without considering the power he may have as constitutionally designated Commander-in-Chief of the armed forces.

As to a given case, it is an exceedingly remote possibility that the President would know of it or be inclined, on his own initiative

17. For an interesting speculation as to how the executive power to refrain from prosecution can be used to obtain the vote of a member of Congress on legislation proposed by the executive see Justice White's opinion in United States v. Brewster, 408 U.S. 501 (1972).
to intercede in it. The practical business of deciding what crimes should be investigated or prosecuted is largely for the Attorney General and his subordinates as the President's "surrogates." For certain crimes, Congress has conferred independent authority upon the United States Attorney in the several judicial districts to exercise prosecutorial discretion without the direct imprimatur of the President, but the grant is hedged with the condition that approval of the Attorney General be first obtained. For all practical purposes, therefore, the President controls prosecutorial discretion for all federal crimes, military as well as civilian. Theoretically, his duty to "take care that the laws be faithfully executed" obligates him and his surrogates to investigate and prosecute every crime. In reality, practical considerations substantially qualify the obligation.

CIRCUMSTANCES AFFECTING PROSECUTORIAL DISCRETION

An obvious circumstance that can force forebearance of investigation and prosecution is inadequacy of funds. In the period before creation of the Federal Bureau of Investigation, Congress provided little funds for investigation of most crimes. In his annual report for fiscal 1905, Attorney General Moody reported that he was constrained to allow "to flourish" the evil of noninvestigation of all but the most conspicuous frauds because of insufficient money. Presently, in terms of total Federal expenditure, Congress may be generous in its appropriations for prosecution of crime, but the enlarged burden of federal law, from enforcement of civil rights to enforcement of the Truth in Lending Act, makes it virtually impossible to investigate every instance of suspected crime.

Less obvious, and certainly less known and understood, is the necessity for adapting prosecution to national security needs. Charges against anti-war activist Leslie Bacon arising out of investigation of the March 1, 1971, bombing of the Capitol were recently dropped because the Justice Department concluded that it could not reply to a defense motion "for disclosure of electronic

surveillance." Since Justice Douglas granted an order staying Ellsberg's trial until appellate determination of a ruling refusing the defense access to government tapes of "foreign intelligence" wiretaps and the Supreme Court voted not to convene in special session to consider Justice Douglas' order, there are indications that the government might be "unwilling to compromise the confidentiality of the surveillance" and, may, therefore, drop the prosecution.

Better known, but viewed differently by lawyers and laymen, is the prosecutorial discretion implicit in "plea bargaining." Apart from the obvious advantage of saving time and money, it may also make good sense not to proceed to conviction on all counts of a multiple count indictment, if the defendant stands ready to plead guilty to one or more of the counts, particularly if all the counts arise from the same transaction. It may often make good sense not to push for conviction on a charge as alleged, and hope for the "pound of flesh" if there are substantial issues of fact as to that charge and the defendant stands ready to plead guilty to a significant lesser offense included within the charge. Conceding both the economic benefits and the good sense in each of the instances cited, the particular exercise of prosecutorial discretion can be unjust, if "justice" is conceived of as that which accords with the conscience and traditions of society, with what is "fair." The justice of a bargained plea may not be synonymous with its legality. As noted previously, the President possesses constitutional authority to absolve a wrongdoer from the consequences of his act in every case except impeachment, but the public's conscience can deter him from its exercise irrespective of his own innermost feelings. Conversely, the President's conscience might decree the justice of exacting the full penalty of law for a particular crime, but public opinion might impel him to pardon. In the McCarthy era, many people in different strata of the American and international communities favored a partial presidential pardon for convicted spies, Julius and Ethel Rosenberg, in the form of changing the death sentence imposed upon them to life imprisonment. Acknowledging the "grave concern . . . of serious people," President Eisenhower concluded that the Rosenbergs' crime had "immeasurably

increased the chances of atomic war” and thereby “may have condemned to death tens of millions of innocent people all over the world;” accordingly, he refused to intervene. The President’s statement left the impression that his refusal was more influenced by his own conscience than by reasoned reflection on the conscience of those who urged him to exercise his discretion. On the other hand, Lieutenant Calley’s prosecutor speculated that since President Nixon had earlier described Calley’s conduct at MyLai as “certainly a massacre,” his mitigative intervention in the case, while it was still in progress, could “only have been prompted by the response of a vocal segment of our population.”

The “justice” of the particular exercise of prosecutorial discretion involved in plea bargaining is almost impossible to measure. At least in large urban areas, the primary consideration may have little relevance to the concept of fairness. The President’s Commission on Law Enforcement and Administration of Justice commented on this circumstance in its report, The Challenge of Crime in a Free Society. While conceding that the degree of discretion in a given case of plea bargaining might be the result of the prosecutor’s conviction that his action was just, the Commission perceived that his decision could as readily have been dictated simply by “the fact that there may be in the system at any one time ten times as many cases as there are prosecutors or judges or court rooms to handle them, should everyone come to trial.” Lawyers may view the result of this kind of justice with equanimity, but experience indicates that laymen have difficulty in reconciling plea bargaining in particular cases with the ideal of “Equal Justice Under Law.” It is almost impossible to explain to a layman that prosecutorial discretion justified the conviction of one accused of a felony and his confinement for several years because he was convicted after a trial, while a participant in the same crime is sentenced to confinement for months under a bargained plea to a misdemeanor.

28. Statement by the President Declining to Intervene on Behalf of Julius and Ethel Rosenberg, PUBLIC PAPERS OF THE PRESIDENTS, DWIGHT D. EISENHOWER (1953), No. 114, June 19, 1953, at 447. See also Statement by the President After Reviewing the Case of Julius and Ethel Rosenberg, Id. No. 10, February 11, 1953, at 40.
29. See note 9 supra.
The attempted assassination of Governor George Wallace of Alabama after he had made a speech in the Democratic Party Presidential primary in Maryland on May 15, 1972, provides an example of a third material influence for the exercise of prosecutorial discretion, specifically, conviction and sentence of the accused in another jurisdiction or court. Arthur Herman Bremer was convicted by a Maryland Circuit Court of a number of offenses arising out of the shooting and was sentenced to consecutive terms of imprisonment for several of the major offenses for a total of 63 years. Thus, the federal prosecutor is confronted with the practical utility or desirability of federal prosecution of Bremer for federal offenses committed in the same shooting.

All of the mentioned circumstances apply to prosecutorial discretion in the military criminal justice system as they apply to the civilian system. But, the prosecuting attorney of the military system, called the trial counsel, possesses none of the power of the civilian prosecutor. He cannot determine the nature or degree of the crime with which to charge the wrongdoer; he cannot drop a charge or reduce the severity of a charge in a bargain for a plea of guilty; he cannot refuse to proceed with a formal charge because he is convinced that the interests of the government will be better served than by conviction of the wrongdoer. All these powers and more, to the point of almost reaching the limits of the President's power to pardon, are vested in a "commanding officer" authorized to convene a court-martial.

At least since the reforms of the Uniform Code of Military Justice in 1950, the major focus on the commanding officer's functions in regard to court-martial has been on his role as a "judicial officer." In many respects the commander retained traditional functions of executive authority. The "transcendental nature" of his power "to exonerate from punishment" was considered by the Court of Military Review in United States v. Kirsch. Since only an overview of prosecutorial discretion is offered here, the follow-

32. Under the Uniform Code of Military Justice [hereinafter cited as UCMJ], the commander of a specified military organization such as an army group, naval station, or air division may convene a court-martial. UCMJ arts. 22(7), 23(7), 24(4), 10 U.S.C. §§ 822, 823, 824 (1970). Others may be designated by the President or the Secretary of the commander's armed force. UCMJ arts. 22(7), 23(7), 24(4), 10 U.S.C. §§ 822, 823, 824 (1970).
33. Hansen, Judicial Functions for the Commander, 41 Mil. L. Rev. 1 (1968) [hereinafter cited as Hansen]
ing excerpt from the principal opinion in Kirsch will serve to define the general dimensions of the commander's authority:

At any stage of the trial he can order the charges withdrawn, and the trial discontinued. Article 44 of the Uniform Code, 10 USC § 844, indicates Congress anticipated a convening authority could, and as the occasion warranted would, withdraw charges after they had been referred to trial. Congress placed no limitation whatever on the exercise of this power. Yet, at the same time it provided, in conformity with the constitutional protection against double jeopardy, that withdrawal of a charge after the introduction of evidence results in the attachment of jeopardy, and thereafter the accused is as fully protected against prosecution as though he had been previously tried and acquitted. Article 44, Code, supra; United States v Johnpier, 12 USCMA 90, 30 CMR 90; United States v Stringer, 5 USCMA 122, 17 CMR 122.

What is the significance of this broad spectrum of power? What name can be given to this aggregate of authority that includes the right to discontinue an investigation into whether a crime has been committed; to dismiss any formal charge that may be made; to direct that a charge previously referred to trial be withdrawn; and, finally, to set aside a determination of guilt by the triers of the facts and the adjudged sentence, and order that the charge be dismissed and the accused be free of any and all punishment prescribed by law for the offenses he committed? What more is embraced in the power of pardon? Combined, the provisions of the Uniform Code confer upon courts-martial authority the power to create an absolute legal bar to prosecution of a person subject to the Code and to his command for any offense in violation of the Code.35

APPLICATION OF DISCRETION

As noted above, to a degree, prosecutorial discretion in the civilian community may be influenced by circumstances unrelated to a sense of justice. Similarly, influences unconnected with any concept of justice may prod the exercise of prosecutorial discretion on the part of a military commander. Combat conditions, for example, may induce him to “empty the whole guardhouse” of accused awaiting trial and those serving adjudged confinement.36 For the usual case, however, military law has attempted to impart an objective standard which has no parallel in civilian law. The Manual for Courts-Martial, which defines the rules of procedure for the military justice system,37 reminds the commander con-

35. Id. at 92, 35 C.M.R. at 64.
36. Comment by General Collins quoted in Hansen, supra note 33, at 49.
fronted with a suspected or known offense, that one of the "basic considerations" in determining whether to prosecute, or on what terms to prosecute, is that his disposition must serve both "the interests of justice and discipline." Arguably, a civilian prosecutor would not refrain from prosecution of a known offense or agree to reduction of a charged offense to a less serious crime without first considering the fairness of his action in regard to both the defendant and the community. One can concede the argument but still be left with an intuitive conviction that, in this area, as in the field of legal and judicial ethics, the existence of a formally promulgated standard for conduct is a powerful inducement to reason, before acting, about the facts and the alternatives to achieve the best balance of the interests and needs of the community with the interests and needs of the individual offender. This intuitive conviction is reinforced by consideration of the kinds of information routinely available to the military commander about the offender, the victim, and the community that are not normally available to the civilian prosecutor in other than rural areas and small towns.

In 1967, the President's Commission on Law Enforcement concluded from its interviews and conferences that "prosecutors ... seldom know anything at all about a defendant's background, character, or way of life, either at first hand or by hearsay," and "may often have no way of judging how the defendant fits into his own society or culture;" as a result, his judgment on the amount and kind of discretion to exercise in a case may be the product only of his personal bias and speculation. There is no evidence that these conditions have materially changed. In contrast, the military commander has available to him and is bound not only to "collect and examine all evidence that is essential to a determination" of guilt but to consider as well "evidence in mitigation or extenuation." He will have a record and specially-prepared information as to previous punishment of the accused, if any, his performance of military duty, his general character, and personal circumstances, such as marital status and other relationships. Empirically, knowledge of matters of crucial importance to a standard of measurement usually assures a greater degree of probability of adherence to that standard; it can, therefore, be fairly concluded that the military commander's choice of a prosecutorial alternative in a particular case is more likely to comport with justice, than the alternative selected by the civilian prosecutor.

40. MCM, 1969, para. 32b.
Complementing the likelihood that a greater quantity of pertinent information will be available to the military commander than to the civilian prosecutor, is the commander's wider range of alternatives between doing nothing about the alleged crime and prosecuting for its most serious aspect.

Both the civilian prosecutor and the military commander can charge an accused with less than the most serious aspect of his crime. Illustratively, in a homicide, they may choose to proceed on a charge of unpremeditated murder or even voluntary manslaughter, although evidence may be at hand to justify a jury's consideration of premeditated murder; or they may elect to accept a plea of guilty to larceny, despite availability of evidence to establish the wrong as robbery. Alternatives of this kind exhaust the civilian prosecutor's range of discretion; they do not so delimit the military commander's.

Prosecutorial Discretion in a Capital Case

Aside from the limitations of the recent Supreme Court decision as to the constitutionality of a death sentence, if the civilian prosecutor concludes that a premeditated murder charge is the only conscionable charge, but that a death sentence would be unjust, he can choose only between compromising the charge to unpremeditated murder or prosecuting the premeditated murder charge, with a recommendation for a lesser sentence than death, in the event of conviction. Acceptance by the judge of the sentence recommendation of the prosecutor may be, as reported by the President's Commission on Law Enforcement, largely perfunctory, but it is doubtful that the practice obtains in death cases; it is certainly inapplicable in cases in which the decision as to death must be made by the jury. However, the military commander can prevent imposition of a death sentence in a capital case. He has specific authority to refer every charge carrying the death penalty, but one (spying in time of war), to trial with instructions that it be treated as a noncapital offense.

42. The Challenge of Crime in a Free Society, supra note 30, at 11.
44. See UCMJ arts. 49f, 106, 10 U.S.C. §§ 849, 906 (1970); MCM, 1969, para. 33j.
Discretion in Noncapital Cases

Civilian jurisdictions frequently have different courts for the trial of different kinds of criminal conduct. The differentiation may be predicated upon the nature of the offense, as a felony or misdemeanor, or it may be based on the status of the offender, as a juvenile or an adult. By reducing a felony charge to a misdemeanor, the civilian prosecutor can effect a change in the court that will try the charge. In the same way, he can affect the legal penalties and the social stigma incident to conviction. But, if no change in the nature of the charge is made, the only way the civilian prosecutor can effectuate his conception of a just limitation on punishment in the event of conviction is to recommend that limit to the trial judge. Again, if the offender is within the statutory age for juveniles, and the offense is one which can be waived from the juvenile court to the regular criminal court for trial as an adult, the prosecutor or the intake officer of the juvenile court can only recommend that the case be transferred. In similar situations the military commander can act on his own.

Military law makes no distinction in the prosecution for crime on the basis of age so there are no juvenile delinquents or youthful offenders as such. Age, however, may be considered in assessment of the sentence. With few exceptions, the military commander can, without reducing the severity of the charge, refer the case to one of the three courts comprising the courts-martial system, the general court-martial, the special court-martial, and the summary court-martial. The choice of court also determines the maximum punishment to which the accused is subject. A general court-martial can impose a sentence to the maximum authorized for the offense, which can extend to a dishonorable discharge and death. However, regardless of the legal maximum for the offense, a special court-martial cannot adjudge confinement in excess of six months, and a summary court-martial cannot impose confinement in excess of one month. The flexibility this system allows

45. United States v. Baker, 14 U.S.C.M.A. 311, 312, 34 C.M.R. 91, 92 (1963). In the civilian community, the accident of age can produce bizarre results. In one case of notoriety in the District of Columbia, three persons robbed a bank and killed a police officer in their escape. After apprehension and indictment for premeditated murder and other charges, one of the three pleaded guilty; just under 22 years of age she was sentenced as a youthful offender, which meant a maximum imprisonment for 9 years and possible parole within 9 months. One of the other defendants was just over 22. He and the third of the trio were convicted as charged and sentenced to life imprisonment. The Washington Post, March 17, 1972.
46. See MCM, 1969, paras. 14, 15, 16.
strengthens the potential for justice, not only in the individual case but in regard to particular offenses. The latter circumstance is dramatically illustrated by the military experience with drug use in Vietnam.

Wrongful use of marihuana is punishable in the military by dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years. It is, therefore, an offense equivalent to a felony in the civilian community. In the first years of the conflict, marihuana users were almost always tried by general court-martial and sentenced to a dishonorable discharge and a substantial period of confinement. As the military learned more about the nature of marihuana and its use by military personnel in the special conditions obtaining in Vietnam, it became generally recognized that trial by general court-martial was inappropriately severe. A similar situation developed in the civilian community in the United States. Where the civilian prosecutor had to await legislation to reduce the severity of the offense, the military commander was able to respond expeditiously to the changed situation by referring a use case to a special court-martial for trial.

Nonjudicial Punishment

While the volume of serious crime is ever-increasing, the great bulk of offenses dealt with in the criminal justice system, civilian and military, are of a routine and minor nature, such as disorders of various kinds. The civilian prosecutor who believes that some kind of punishment is essential for rehabilitation of the accused has no choice but to submit the offense to trial. A significantly different choice is open to the military commander. He can resort to a form of disciplinary punishment as a substitute for the criminal proceedings of courts-martial.

Authorized by Article 15 of the Uniform Code of Military Justice, the commander can impose a variety of punishments for “minor offenses.” The Code does not define the nature of a minor offense, but the Manual for Courts-Martial describes it as not including misconduct “of a kind which, if tried by general court-martial, could be punished by dishonorable discharge or confinement for

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48. MCM, 1969, para. 127c, Table of Maximum Punishments.
However, the Manual’s description is not rigid, and it contemplates consideration of “the circumstances surrounding” the commission of the offense, as well as the nature of the offense and its authorized maximum punishment. Moreover, the Manual encourages recourse to Article 15, instead of court-martial. In the event of conviction by court-martial for a later offense, Article 15 punishment is not, as a previous conviction by court-martial is, a basis for an increase in the maximum punishment for the later offense. Another special feature of such punishment is that, unlike the practice in most civilian jurisdictions which preserves for all time even the record of arrest for the most minor offense, the official record is preserved for only a limited period of time, and with certain exceptions, is expunged from the individual’s service record when he is transferred to another unit.

CONCLUSION

As is true of any power, its exercise can be abused. More often, depending upon the perspective of the viewer, it may only appear to be abused. Reportedly, Daniel Ellsberg’s attorneys believe that the Administration’s efforts to complete the Ellsberg trial before the presidential election is politically motivated. Some critics of the Air Force’s action in General Lavelle’s case apparently believe that its failure to prosecute the general is an abuse of prosecutorial discretion. Abuse, real or imagined, is, however, the unusual. In the main, prosecutorial discretion is an extremely valuable means of achieving a just balance in the quadruple objectives of the criminal justice system: (1). effective punishment for the individual; (2). removal of dangerous persons from the community; (3). transformation of the law-breaker into the law-abiding; and (4). deterrence of others from crime. To the extent that military law allows a broader range of prosecutorial discretion than is permitted by civilian law to the civilian prosecutor, the military justice system has a greater capability for providing justice in a particular case.

50. MCM, 1969, para. 128b.
51. Id., para. 129. Except aboard a vessel, the accused has the right to refuse nonjudicial punishment and to demand, in lieu thereof, trial by court-martial. Id., para. 132.
52. Id., para. 127c, § B.