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DISLOYALTY AMONG “MEN IN ARMS”: KOREAN WAR POWS AT COURT-MARTIAL

ELIZABETH LUTES HILLMAN*

This Essay analyzes the legal dilemmas that confronted the United States armed forces and repatriated prisoners of war after the armistice that ended the Korean War. After surviving a harrowing internment in POW camps, a handful of soldiers among the thousands who were returned to the United States were subjected to court-martial for collaboration with the enemy. This Essay argues that the prosecutions of POWs for alleged disloyalty reveal both the anxiety that characterized American politics in the mid-1950s and the still-arbitrary nature of military criminal prosecutions under the Uniform Code of Military Justice, a major legal reform that military judges, commanders, and judge advocates were only beginning to understand and implement during the Korean War.

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INTRODUCTION

[I]t is necessary in time of serious threat to our form of Government that this country call upon its men in arms to withstand the horrors of war and prison to prevent an enemy from destroying that which has been our heritage for at least 167 years. It goes without saying that all men cannot stand firm against torture, physical violence, starvation or psychological mistreatment. But in this instance, the record discloses that the accused weakened when others stood fast, and it does not reveal that he was compelled to sacrifice his countrymen because of the use of those influences.¹

During the Cold War, millions of Americans stood accused before military courts, charged with crimes defined by their commanders and tried according to special procedures set out in the Uniform Code of Military Justice ("UCMJ").² This new code—the greatest reform in the history of American military law—granted accused servicemembers basic procedural rights, including access to counsel and the opportunity to appeal their cases to a court of civilian judges, for the first time.³ The pre-UCMJ regime of military law had been exposed as harsh and unfair during World War II, leading veterans and politicians to demand postwar reforms standardizing the definitions of military crime and affording servicemembers some degree of due process.⁴ Whether charged with murder and rape, going AWOL, disobeying orders, or frequenting gay bars, Cold War troops had greater legal protections than earlier generations of American soldiers.

But the fate of those accused of military crimes during the 1950s, 60s, and 70s was determined as much by the context in which the UCMJ was implemented as by the procedures specified in the new

1. *United States v. Batchelor*, 22 C.M.A. 354, 372 (1956).

2. 10 U.S.C. §§ 801–950 (2000).

3. *See generally* WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* (1973) (sketching the development and reform of military law from World War II through the Military Justice Act of 1968); Walter T. Cox, III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987) (explaining UCMJ reforms, particularly the Court of Military Appeals as a civilian appellate judicial body and a right to counsel in general court-martial proceedings); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 182–84 (1953) (discussing the creation of the Court of Military Appeals and its jurisdiction as well as procedures in cases with serious penalties that extend beyond procedures offered in civilian courts).

4. *See generally* sources cited *supra* note 3 (presenting the historical changes of the UCMJ).

code. The political and social stresses of the Cold War, felt throughout American society, rippled through the American armed forces with special intensity. The civil rights movement, feminism, open homosexuality, and political dissent posed fundamental challenges to authority that loomed especially large in the military, an institution rooted in hierarchy, deference, and tradition. The cases that moved through the newly reformed military justice system offer a vivid look at the compromises and conflicts that arose in a society so invested in order and stability yet cast as a primary defender of autonomy and freedom.⁵

This Essay analyzes a highly charged subset of Cold War courts-martial: the trials of repatriated POWs after a ceasefire ended the Korean War in 1953. In the history of modern prosecutions for alleged disloyalty, the Korean War POW cases stand out because the defendants were servicemen whose crimes took place in POW camps, an unlikely place to find spies or traitors. The most notorious military trials of the 1950s, the POW courts-martial targeted a handful of prisoners accused of collaborating with the enemy in North Korean and Chinese prison camps.⁶ They became a public relations flashpoint for the Cold War armed forces, bringing the unpatriotic acts of servicemen and a new system of military criminal justice to center stage.⁷ The media attention documenting the plight of the “turncoat GI’s” caused heartache among veterans and frustrated military leaders who sought to turn the public’s eye toward more positive images of America’s military exploits.⁸ For their distinctiveness and for the insight they offer into the political and legal atmosphere of the United States during the Cold War, the POW cases deserve a place in the history of American efforts to identify and punish disloyalty.

The court-martialed POWs became symbols of the weakness and disloyalty that military and civilian leaders felt obliged to purge from

5. This work is part of a larger study of how the reformed court-martial of the Cold War military responded to rapid social change and growing political tension. I elaborate on these arguments in *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* (forthcoming 2005). For an earlier version, see Elizabeth Lutes Hillman, *Cold War Crime and American Military Culture: Courts-Martial in the United States Armed Forces, 1951–1973* (2001) (unpublished Ph.D. dissertation, Yale University) (on file with the North Carolina Law Review).

6. See *infra* Part III.

7. See generally ALBERT D. BIDERMAN, *MARCH TO CALUMNY: THE STORY OF AMERICAN POW’S IN THE KOREAN WAR* (1963) (discussing the experiences of American prisoners of war during the Korean War).

8. See *infra* Part III.

the ranks of the Cold War armed forces. But viewing the POWs convicted for collaborating as merely too weak to withstand the indoctrination efforts of their Communist captors overlooks the political, social, and cultural factors that put them at risk of criminal prosecution. The soldiers prosecuted for disloyalty were mostly those who had entered military service without the privileges of wealth, status, or education. Once in the service, the personalities of these young men failed to win either the support or loyalty of fellow troops, many of whom engaged in behavior very similar to that of the men singled out for prosecution.⁹ Court-martialing a few young soldiers for apparent disloyalty obscured the larger issue of why servicemembers might be drawn to Communist doctrine. It also did nothing to prepare future generations of soldiers for the trauma of POW camps. Bringing criminal charges against a few POWs enabled military leaders to shift blame for the military's performance in the Korean War away from inadequate planning or poor execution by the armed forces and onto the purported weakness of the rank and file of the American military.

Neither the military nor its justice system was well equipped to manage the prisoners' ideological "weakness," more accurately characterized as vulnerability to Communist indoctrination. The POW courts-martial were attentive to legal process, and clemency mitigated the sentences of those convicted.¹⁰ But the court-martialed POWs did not deserve the ignominy of being made criminals for failing to stand up to communists while imprisoned, nor should they have been imprisoned by American authorities after finally being released from long confinements in enemy POW camps. Some of these soldiers did act to improve their own circumstances relative to that of fellow prisoners. Their severe punishment, however, resulted not from their bad acts, but from the vortex of Cold War politics and recrimination in which they were unwittingly caught up. Most POWs who acceded to the demands of their captors in prison camps during the Korean War were not prosecuted; postwar courts-martial punished only a few among many who were similarly culpable. Military trials both imposed severe, arbitrary punishments and ignored the lack of privilege, training, and social skills that led the POWs into "collaborating" with their Communist captors.

The POW courts-martial inspired criticism from virtually all sides, revealing the conflict between procedural justice and military

9. See *infra* Part II.A.

10. See *infra* Part III.

culture. Military judges and practitioners of military law defended the recently reformed court-martial system against attacks from across the political spectrum. Military traditionalists doubted whether the UCMJ, or the new bureaucratic style of the armed forces, could guarantee performance under fire. To them, the POW courts-martial were too few, too public, too legalized, and too lenient. Civil libertarians saw prosecutions for “collaborating” as yet another example of McCarthyism run amok and blamed the armed forces for vilifying soldiers whose ideas did not comport to desired political viewpoints. Veterans resented the disproportionate attention focused on the few servicemen who had “broken” under Communist pressure given the many who served diligently, even heroically, throughout the war. Addressing the alleged ideological weakness of American soldiers in the formal venue of a criminal trial brought legal values of process and openness into conflict with military values of deference to authority and limited disclosure.

The opinions of the military courts in these highly charged cases reveal the impact of the Korean War on American law and policy while illuminating the arbitrary prosecutions and political biases that made fairness elusive at court-martial, even after the reforms of the UCMJ. Parts I and II of this Essay set the stage for studying the POW cases. Part I examines the ways in which the politics and culture of the Cold War affected the post-World War II military. Part II focuses on how the legal, political, and material circumstances of the POWs led to eventual criminal prosecutions. Part III reveals how selective prosecution worked to punish only a few of the many who suffered long imprisonments in the camps. Part IV details the exemplary cases of two Army enlistees court-martialed as collaborators, characterizing their defense tactics and the legal procedures that governed their trials and appeals. Part V assesses the broader implications of prosecuting disloyalty at court-martial, including how the actions of the POWs can be explained and why prosecutors chose to use military rather than civilian criminal courts. The Essay’s Conclusion places the injustice of the Korean War POW courts-martial into historical perspective, adding a brief discussion of the treatment of Vietnam War POWs to this Cold War history of war, crime, and imprisonment.

I. "IN TIME OF SERIOUS THREAT": FEAR, WAR, AND CAPTIVES

The armed conflicts of the Cold War era added a new chapter to the already long series of American captivity narratives.¹¹ The capture and imprisonment of thousands of servicemembers during the wars in Korea and Vietnam sparked fear and outrage reflected in books, television shows, and movies, including John Frankenheimer's *The Search for the Manchurian Candidate*,¹² an unsettling political thriller about mind control and political repression.¹³ POWs, real and imagined, permeated popular culture and redirected academic inquiry in the United States.¹⁴ Massive increases in government-funded studies of ideological conversion and mental health were justified by the specter of American prisoners succumbing to Communist indoctrination during the Korean War.¹⁵ The Department of Defense and other agencies invested millions in a search for new psychological weapons, hoping to reduce the vulnerability of American soldiers to Communist ideology and to spread American democracy abroad

11. See RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* 495–96, 621–23 (1992) (noting the echoes of early American captivity narratives in late twentieth-century American culture and in the representation of Vietnam POWs). See generally ROBERT C. DOYLE, *VOICES FROM CAPTIVITY: INTERPRETING THE AMERICAN POW NARRATIVE* (1994) (“[T]he civilian and military captivity narrative is an important literary form, one that has chronicled part of the American experience for three hundred years.”); JILL LEPORE, *THE NAME OF WAR: KING PHILLIP’S WAR AND THE ORIGINS OF AMERICAN IDENTITY* 125–49 (1998) (discussing the significance of captivity narratives on developing American identity).

12. *THE SEARCH FOR THE MANCHURIAN CANDIDATE* (United Artists 1962).

13. This film, adapted from Richard Condon’s 1959 novel and starring Frank Sinatra, drew parallels between the evils of repressive anti-communism and the “brainwashing” allegedly practiced by Chinese Communists against prisoners of war. See, e.g., CYNDY HENDERSHOT, *ANTI-COMMUNISM AND POPULAR CULTURE IN MID-CENTURY AMERICA* 136–43 (2003). The film developed a cult following despite being pulled from circulation after President John F. Kennedy’s assassination in 1963—either because of Sinatra’s concern over the assassination plot of the film or a rumored contract dispute between Sinatra and United Artists. It was re-released in 1988 to critical acclaim. See, e.g., Roger Ebert, *A Political Satire for the Ages*, CHI.SUN-TIMES, Dec. 7, 2003, at 3, available at 2003 WL 9578376.

14. See HENDERSHOT, *supra* note 13, *passim*; see also RON ROBIN, *THE MAKING OF THE COLD WAR ENEMY: CULTURE AND POLITICS IN THE MILITARY-INTELLECTUAL COMPLEX* 144–81 (2001) (discussing the focus on rumors of defections by American POWs).

15. See ROBIN, *supra* note 14, at 144–81; see also JOHN MARKS, *THE SEARCH FOR THE “MANCHURIAN CANDIDATE”: THE CIA AND MIND CONTROL* 125–27 (1979) (detailing the climate in which the idea of brainwashing surfaced and discussing the resulting studies in which the CIA were involved); CHRISTOPHER SIMPSON, *SCIENCE OF COERCION: COMMUNICATION RESEARCH AND PSYCHOLOGICAL WARFARE, 1945–1960*, at 63–65 (1994) (discussing military commissioned studies of psychological warfare in the Korean War era).

more effectively.¹⁶ By the 1960s, military spending on social science research, most of which involved psychology, reached nearly fifteen million dollars per year, more than the entire research and development budget of the military prior to World War II.¹⁷

In 1951, Americans were unaccustomed to either extended overseas deployments or to seeing young troops captured and imprisoned by foreign armies for long stretches of time. The newly permanent, nuclear armed forces faced challenges in the pressroom as well as on the battlefield as the United States government tried to maintain a positive image of military service and of American democracy. Troubled by the image of soldiers knuckling under to Communist pressure, military leaders sought out ways to portray American servicemembers as ideologically resilient and reliably anti-Communist. President Eisenhower called a press conference in September 1953 to draw attention to the political education of servicemembers; Congress held hearings on Communist propaganda; and military leaders implemented a more aggressive program of anti-Communist indoctrination.¹⁸ The armed forces also adopted a much-heralded Code of Conduct¹⁹ in 1955, hoping to establish and publicize high standards for the behavior of soldiers under fire and after capture.²⁰ The military reacted to the possibility of Communist sympathizers in uniform by scrutinizing recruits and personnel, implementing political education programs, and classifying information.

16. See generally ELLEN HERMAN, *THE ROMANCE OF AMERICAN PSYCHOLOGY: POLITICAL CULTURE IN THE AGE OF EXPERTS* 124–52 (1995) (discussing the development of psychological understanding in the Cold War period).

17. *Id.* at 128.

18. See Morris Janowitz, *Civic Consciousness and Military Performance*, in *THE POLITICAL EDUCATION OF SOLDIERS* 55, 65–66 (Morris Janowitz & Stephen D. Wesbrook eds., 1983) [hereinafter *THE POLITICAL EDUCATION OF SOLDIERS*] (arguing that “U.S. service personnel held beliefs which worked effectively to protest and insulate them from communist ideological appeals”). See generally *Investigation of Communist Propaganda Among Prisoners of War in Korea: Hearings Before the Committee on Un-American Activities*, 84th Cong. (1956); Thomas A. Palmer, *Why We Fight: A Study of Indoctrination Activities in the Armed Forces*, in *THE MILITARY IN AMERICA: FROM THE COLONIAL ERA TO THE PRESENT* 383–94 (Peter Karsten ed., rev. ed. 1986). The Eisenhower Library’s collection includes extensive materials on the military’s concern with psychological warfare as a critical element of Cold War strategizing. See, e.g., White House Central Files, General File, Box 1184, Folder 150–E, “Psychological Warfare, 1952–53.”

19. See Exec. Order No. 10,631, 3 C.F.R. 266 (1954–1958).

20. The Code has been frequently reprinted in secondary sources. See, e.g., RAYMOND B. LECH, *BROKEN SOLDIERS* 297–98 (2000) (reprinting the Code in its entirety).

The armed forces' reaction to the apparent ideological weakness of their troops did not go unnoticed or unchallenged, however. Like McCarthy-style anti-Communism, the military's emphasis on aggressive political education elicited spirited opposition and lasted only a few years. In 1955, letters streamed into the White House objecting to the new Code of Conduct.²¹ Veterans, reservists, parents of servicemembers, and other citizens wrote from Philadelphia, Kansas City, Chicago, Boston, Miami, El Paso, Jacksonville and many other places to protest the religious nature of the Code, its potential for violating the Free Speech Clause of the First Amendment, and the excessive burden it placed on young soldiers.²² In 1961, the Army relieved Major General Edwin A. Walker of command after his overzealous anti-communism led him to remove books from a base library and denounce civilian officials such as Secretary of Defense Robert McNamara.²³ Although the Code of Conduct remained in effect, by 1964 the Army backed off from its most emotionally charged and controversial political education programs.²⁴ The military continued to worry about preparing its soldiers to withstand enemy efforts to

21. See White House Central Files, General File, Box 232, Folder 11-H-9, Code of Conduct for Members of the Armed Forces of the United States, Eisenhower Library.

22. See *id.* Servicemembers' rights to free speech, and to some extent, religion, were qualified versions of the protections the First Amendment guaranteed to civilians. The Supreme Court did not consider the issue directly until the 1970s. See Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 303-66 (1998) (reviewing First Amendment jurisprudence in the military context). Earlier studies of free speech among servicemembers were triggered by the controversies of the Vietnam era. See generally John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968); Edward F. Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L. J. 325 (1971); Donald N. Zillman, *Free Speech and Military Command*, UTAH L. REV. 423 (1977); Donald N. Zillman & Edward J. Inwinkelried, *An Evolution in the First Amendment Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42 (1975) (discussing two servicemen's challenges to two articles of the UCMJ stemming from prosecution for conduct that occurred during the Vietnam War); William Saunders Graf, *The Parameters of Free Speech in the Military* (1973) (unpublished Ph.D. dissertation, University of Wisconsin); Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 *passim* (1957) (offering a pre-Vietnam War analysis of speech restrictions on military personnel in relation to the First Amendment).

23. Stephen D. Wesbrook, *Historical Notes*, in THE POLITICAL EDUCATION OF SOLDIERS, *supra* note 18, at 277-78. Walker gained further infamy after retiring from the Army when he tried to rally Mississippians to fight the racial integration of the University of Mississippi. See, e.g., TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963, at 656-65 (1988) (recounting the integration incident at the University of Mississippi and Walker's involvement).

24. See Wesbrook, *supra* note 23, at 267-68 (discussing the change from "Troop Information" to "Command Information").

recruit spies throughout the ensuing decades, but the political and cultural atmosphere of the Vietnam era did not permit the same excesses as the early years of Cold War.²⁵

In addition to the fear of communism that changed American politics and culture, bureaucratic and geopolitical factors also complicated the world to which the Korean War POWs returned. Because the UCMJ was implemented in the midst of battle in Korea, its reforms were neither fully explained to all servicemembers nor well understood by all military attorneys.²⁶ The POWs were charged under the UCMJ for acts committed while the old Articles of War were still in effect, creating confusion about how to draft appropriate charges.²⁷ More broadly, the American military was not prepared for the abrupt start of the war, which increased disciplinary problems and psychiatric casualties and resulted in troops not ready to bear the burden of imprisonment in enemy camps.²⁸ The strategic, political, and military blunders that led the United States and its allies into a mismanaged war in Korea, combined with a potent fear of global communism, raised the stakes for the American troops who fought in Korea and then faced criminal prosecution back in the United States.

II. "THE HORRORS OF WAR AND PRISON": IMPRISONMENT

While heightened fears of communist subversion altered the political and cultural landscape at home, American troops imprisoned

25. See generally *id.* (looking at the decline of political training in Vietnam).

26. See, e.g., Daniel J. Meador, *Justice in Fatigues: With JAGC in Korea*, 14 *EXPERIENCE*, at 28, 28 (2003) ("Regular Army JAG officers who had worked with the old system had to be reoriented, and dozens of new JAG officers had to be retrained."). Meador explains that "[t]he United States thus entered the Korean War with a brand new military justice system that had never been combat tested and hardly tested at all." *Id.* See generally *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 203-31 (1975) (describing the substantial changes in military law reflected in the UCMJ); CAPTAIN JAY M. SIEGEL, *ORIGINS OF THE NAVY JUDGE ADVOCATE GENERAL'S CORPS: A HISTORY OF LEGAL ADMINISTRATION IN THE UNITED STATES NAVY, 1775-1967* (1997) (discussing the history of Navy administration in the United States from 1775 until the founding of the Navy Judge Advocate General's Corps in 1967).

27. See, e.g., *United States v. Gallagher*, 23 C.M.R. 591, 597-98 (1957) (noting a charged violation of Article of War 92 that was actually drafted according to article 118(2) of the UCMJ rather than the Article of War).

28. See LECH, *supra* note 20, at 3 (quoting Navy Commander Ralph Bagwell's analysis of POW conduct in Korea as being a result of inadequate preparation); see also BEN SHEPHARD, *A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY* 341-43 (2001) (describing the psychological problems experienced by soldiers during the World Wars, Vietnam, and afterward). See generally DAVID REES, *KOREA: THE LIMITED WAR* (1964) (noting personnel and training problems during the war).

in East Asia languished, waiting for the signing of an armistice that was delayed by Cold War politics. The POWs were critical to the armistice negotiations, which ground to a halt over the issue of prisoner repatriation.²⁹ Convinced that many prisoners in United Nations camps were impressed into service and did not want to be returned to China or North Korea, the United States opposed the simple procedure of forced repatriation set out in the 1949 Geneva Prisoner of War Convention.³⁰ Instead, negotiators sought voluntary repatriation, which would permit POWs to decide their own fates.³¹ Aware of the political impact of “freeing” thousands of North Korean troops and wary of granting a public relations coup to the Chinese after making public statements about the number of North Korean POWs who rejected Communist doctrine,³² the Eisenhower Administration refused to sacrifice non-forcible repatriation to hasten the return of U.N. prisoners.³³ The United States paid a high price for this decision: 45% of the war’s American casualties took place between the start of armistice negotiations in July 1951 and their conclusion in the summer of 1953.³⁴ The POWs were incarcerated through a war marked by political ambiguity and a postwar atmosphere rife with uncertainty and recrimination. This Section details the experience of the POWs and the American media’s and government’s reactions to their plight.

29. See generally ROSEMARY FOOT, *A SUBSTITUTE FOR VICTORY: THE POLITICS OF PEACEMAKING AT THE KOREAN ARMISTICE TALKS* (1990) (analyzing the controversy and political climate during and after the war).

30. See FOOT, *supra* note 29, at 108.

31. *Id.*

32. *Id.*

33. See, e.g., Harry P. Ball, *Prisoner and War Negotiations: The Korean Experience and Lesson*, in 62 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 292, 296–307 (Richard B. Lillich & John Norton Moore eds., 1980) (discussing the negotiations and voluntary repatriation); Howard S. Levie, *How It All Started—and How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 222 (2002) (discussing armistice negotiations).

34. See FOOT, *supra* note 29, at 208. Although sick and wounded prisoners were exchanged in a spring 1953 operation termed “Little Switch,” the “Big Switch” of prisoners did not take place until August 1953. *Id.* The popular 1959 film *Pork Chop Hill*—directed by Lewis Milestone, based on a book by S.L.A. Marshall, distributed by United Artists, and starring Gregory Peck—dramatized the frustration of Americans with the losses suffered during the lengthy armistice talks. *PORK CHOP HILL* (MGM/United Artists 1959). For other Korean War films, see generally PAUL M. EDWARDS, *A GUIDE TO FILMS ON THE KOREAN WAR* (1997) (listing Korean War films).

A. *The Camps*

Korean War POWs faced conditions of extreme deprivation. Prisoners endured physical and mental abuse in camps and on forced marches, especially during the first few months of the war.³⁵ Official figures from the Department of Defense reported a death rate of 38% among American POWs, with close to 3,000 deaths among 7,190 captives.³⁶ A recent study places the death rate at 43%, far higher than for most prisoners of modern wars.³⁷ In the Vietnam War, for example, the death rate among the 766 captured Americans was 14%.³⁸ Summary executions and extreme brutality in Korean War POW camps exacerbated the lack of adequate food, housing, sanitary facilities, and medical care.

Under such conditions, separating acts of disloyalty from behavior essential to survival was all but impossible.³⁹ Starvation was the primary means by which prisoners were “trained” to accept Communist doctrine and to denounce American politics and actions.⁴⁰ Most POWs gradually capitulated to demands that they study Communism, espouse its principles, and denounce the United States.⁴¹

35. Abuses took place on both sides of the 38th parallel. See FOOT, *supra* note 29, 109–21 (discussing the coercion and poor conditions faced by prisoners of the UN forces in Korea).

36. See U.S. DEP’T OF DEF., POW: THE FIGHT CONTINUES AFTER THE BATTLE; REPORT OF THE SECRETARY OF DEFENSE’S ADVISORY COMMITTEE ON PRISONERS OF WAR 79–82 (1955). But see BIDERMAN, *supra* note 7, at 91–113 (arguing convincingly that both the total number of prisoners and the reported death toll were likely underestimates).

37. LECH, *supra* note 20, at 2.

38. Lech also notes that the only comparable rates of death in modern warfare are the rate of Germans who died after being captured by Russians on the Eastern Front during World War II (45%) and the rate of Russians who died in German camps during the same war (60%). See LECH, *supra* note 20, at 2.

39. The difficulty of distinguishing willful disobedience from the consequences of inexperience and fear was a problem in courts-martial triggered by events outside the POW camps as well. It was the “fog of war” (Clausewitz’s term for the confusion and stress of battle) that led an Army board of review to reverse the convictions of two infantrymen in *United States v. McCoy*, 13 C.M.R. 285 (1953), who had been court-martialed for failing to execute successfully their orders to take a hill in the midst of a Korean War firefight. See *id.* at 286.

40. See LECH, *supra* note 20, at 3. BROKEN SOLDIERS reconstructs the prisoners’ harrowing experiences through some 60,000 pages of recently declassified documents. *Id.*

41. *Id.* at 92–108 (reconstructing the depth and breadth of prisoner cooperation with Communist indoctrination); see also MARKS, *supra* note 15, at 126–31 (noting the results of communist mind control tactics on American soldiers and describing both Soviet and Chinese approaches to brainwashing).

B. Reactions

Even the military's harshest critics recognized the psychological and physical strain prisoners lived under in Chinese and North Korean camps,⁴² but media coverage of the alleged collaborators was mixed. Newspaper and magazine accounts of the POWs tended to blame defects in American culture and morality for the weakness of servicemembers; "give-up-itis," a purportedly contagious tendency to quit under fire, was coined to describe the weaknesses of the American soldier in Korea.⁴³ The inability of captive Americans to escape from the camps attracted extensive media criticism.⁴⁴ No one successfully escaped from a Chinese or North Korean prison camp during the war.⁴⁵ Americans seemed to recognize the hardships of the camps but nonetheless found fault with the prisoners who succumbed to the pressure.

Military officials and social scientists defended the POWs, arguing that their behavior was comparable to that of prisoners in past wars and that those who capitulated were victims of "brainwashing." Although there was no Chinese word for the concept, American journalist Edward Hunter translated the Chinese *hsi nao* as "wash brain," introducing the expression into American English.⁴⁶ Also referred to as "coercive persuasion" or "menticide,"

42. See, e.g., *Text of Inquiry Findings on Marine Col. Schwable and Comments by Defense Officials*, N.Y. TIMES, Apr. 28, 1954, at 16; see also BIDERMAN, *supra* note 7, at 61-63 (criticizing Kinhead's failure to address the coercion methods used on American POWs); LECH, *supra* note 20, at 3, 52-53 (discussing starvation). The military press did not cover the POWs as closely as the civilian press; very limited coverage of the POW cases appeared in the *Army Times*, a widely distributed military newspaper. For a sample of the cartoons that occasionally depicted POWs in the military press, see ARMY TIMES—VETERANS' EDITION, Aug. 22, 1953, at 16; ARMY TIMES—VETERANS' EDITION, Aug. 15, 1953, at 18.

43. See BIDERMAN, *supra* note 7, at 19-21 (offering a critique of "give-up-itis" in terms of similar conceptions in prior wars); see also DON J. SNYDER, A SOLDIER'S DISGRACE 173 (1987) (discussing "give-up-itis").

44. ROBIN, *supra* note 14, at 162; see also TOM ENGELHARDT, THE END OF VICTORY CULTURE: COLD WAR AMERICA AND THE DISILLUSIONING OF A GENERATION 65 (1995) (noting that twenty-one American POWs actually defected to China).

45. E.g., LECH, *supra* note 20, at 136. This fact inspired the title of Eugene Kinhead's popular book on the POWs in Korea. See EUGENE KINHEAD, IN EVERY WAR BUT ONE 15 (1959).

46. See generally EDWARD HUNTER, BRAIN-WASHING IN RED CHINA: THE CALCULATED DESTRUCTION OF MEN'S MINDS (1971) (describing the development of brainwashing techniques in Communist China). I am grateful to Marilyn Young for pointing out the questionable accuracy of Hunter's translation. See also HUNTER, *supra*, at 308-09 (noting how many American POWs of the Chinese thought they had not been treated well upon their release); ROBERT JAY LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF "BRAINWASHING" IN CHINA 45 (1961).

brainwashing was thought to reduce resistance through techniques such as isolation, sleep deprivation, inadequate food and sanitation, assignment of repetitious tasks, threats, assaults, and forced acts of betrayal.⁴⁷ It became a popular explanation for the POWs behavior among cultural observers who feared both the frailty and alienation of post-World War II American society.⁴⁸ POWs, defense attorneys, and commanding officers alike tended to explain the widespread acquiescence of American troops to Communist indoctrination as part of the physical and emotional toll of captivity rather than as a sign of disloyalty.⁴⁹

At its core, the “brainwashing” explanation for collaborating POWs is convincing. Most soldiers who became dedicated Communists in the camps were fighting to survive or hoping to improve their living conditions, not making principled decisions or objective choices among political systems. Abuse and coercion shape virtually every experience of imprisonment, a reality that was no doubt clear to the military leaders who elected not to prosecute the vast majority of POWs who could have been tried under the UCMJ. This coercion was at the root of the brainwashing rationale, which effectively shifted blame from the American military, and from the United States itself, onto the deceptive tactics of an unseemly enemy.

(arguing that the Chinese Communist program of “thought reform” was “one of the most powerful efforts at human manipulation ever taken,” and that it was much more “total” than other programs used in Chinese schools, universities, prisons, and business and government offices); MARKS, *supra* note 15, at 125 (confirming this linguistic point and noting the more accurate translation of *hsi nao* as “to cleanse the mind”); ANDREW J. PAVLOS, *THE CULT EXPERIENCE* 51–52 (1982) (noting that “[s]ome experts of the Korean War prefer the term coercive persuasion rather than brainwashing because the stress was on controlling POW’s rewards and punishments and not on classical or Pavlovian conditioning techniques”); Letter from Edward Hunter to the *New York Times Book Review* Editor, N.Y. TIMES BOOK REV., Mar. 29, 1959, at 24 (complaining about a review that overlooked Hunter’s two books on brainwashing).

47. See generally Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded (‘Brainwashed’) Defendant*, 63 MINN. L. REV. 1 (1978) (summarizing these and other brainwashing practices in discussing how the law should treat “brainwashed” defendants).

48. See ROBIN, *supra* note 14, at 169–70; see also TIMOTHY MELLEY, *EMPIRE OF CONSPIRACY: THE CULTURE OF PARANOIA IN POSTWAR AMERICA*, at vii (2000) (discussing the author’s conception of an “intense anxiety about an apparent loss of autonomy—the conviction that one’s actions are being controlled by someone else”); Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 YALE J.L. & HUMAN. 171, 179–95 (2000) (arguing that social and political science writers of the 1940s and 1950s felt that “modern society in the United States was pathological, and its myth-laden irrationalism raised the threat of a totalitarian society”).

49. See, e.g., LECH, *supra* note 20, at 229–60 (detailing the general court-martial proceedings for several Korean War POWs).

By displacing other explanations—like the potential appeal of Communist doctrine to American troops—that military leaders found less palatable, brainwashing served the United States' political goals while helping to articulate the psychological trauma of the POWs experiences. The armed forces were willing to excuse most, but not all, of soldiers' misconduct in the camps as a result of psychological and physical coercion and abuse.

III. "ALL MEN CANNOT STAND FIRM": SELECTIVE PROSECUTION

Although commanding officers realized how bad the conditions were in the POW camps, they still felt obliged to enforce certain standards of military discipline upon those who returned from imprisonment. Deciding how to identify and punish soldiers who appeared to reject American democratic ideals in favor of Communism, or had otherwise acted inappropriately in the POW camps, was at least as difficult as crafting a response to the political challenges of the war. This Part discusses how military and government leaders elected to press charges against just a few of the thousands of soldiers who could have been prosecuted for violating military law in the camps.

The most potent weapon at commanders' disposal was the general court-martial, a criminal forum that could punish servicemembers with fines, reductions in rank, imprisonment, and even death.⁵⁰ Although the court-martial was rarely used during the Cold War compared to its use under earlier regimes of military law, the military decided to court-martial some of the repatriated Korean War POWs for collaborating with the enemy.⁵¹ However, these accused POWs were the exception, not the rule, in the treatment of repatriated prisoners. Military sociologist Albert Biderman argued that the military legal system, in sharp contrast to the opportunistic and naïve reactions of many journalists and scholars, functioned as a model of restraint in choosing not to prosecute most repatriated Korean War POWs.⁵² Even the Army, the service most damaged by reports of collaborating prisoners and most aggressive in prosecuting

50. See generally FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE (2d ed. 1999) (outlining the procedural and substantive rules, military acronyms, and related practices unique to military criminal law); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (5th ed. 1999) (describing the substantive underpinning of court-martial and delineating court-martial procedure).

51. See Hillman, *supra* note 5, at 78. The court-martial rate in general dramatically declined during the Cold War. *Id.* at 69–110.

52. BIDERMAN, *supra* note 7, at 223–26.

them, sought to limit the need for courts-martial by expanding the powers of commanders to censor servicemembers through other means, such as non-judicial punishment under article 15 of the UCMJ.⁵³ Military officers during the Cold War resorted to the court-martial only in extraordinary situations, turning instead to alternative disciplinary tools to address routine misbehavior.

Commanding officers knew that many prisoners were guilty of some degree of cooperation with their captors.⁵⁴ The military's exhaustive debriefing of the 4,000 repatriated POWs revealed that most violated the regulations allowing prisoners to provide only their name, rank, and serial number to captors.⁵⁵ More than 500 prisoners were investigated for alleged misconduct in the camps.⁵⁶ FBI investigators reported on many POWs who signed peace petitions and wrote to family members urging that they oppose the war.⁵⁷ Most POWs, despite their efforts to resist the demands of their captors, faltered under the physical abuse and psychological coercion of the camps.

The newly reformed military justice system treated a small minority of the total instances of prison camp collaboration as serious offenses, convicting just eleven men at general courts-martial for excessive cooperation with the enemy.⁵⁸ A scant fourteen of the 4,000 repatriates were brought to trial.⁵⁹ Only the POWs vilified by fellow soldiers during the debriefing process, whose actions in the camps became public and embarrassed military leaders, or who did not manage to turn the tide of public opinion in their favor, were prosecuted for criminal conduct in the POW camps.⁶⁰

53. See Joseph W. Bishop, Jr., *Constitutional Rights of Servicemembers Before Courts-Martial*, 64 COLUM. L. REV. 127, 144–46 (1964) (discussing the Army's disciplinary problems among American POWs and the resulting congressional authority for more article 15 punishments).

54. See LECH, *supra* note 20, at 104–06.

55. See *id.* (discussing the impossibility of adhering to the name, rank, and serial number regulation).

56. See BIDERMAN, *supra* note 7, at 30 tbl. 1 (detailing the breakdown by branch of service of former POWs investigated after the war, totaling 565).

57. See White House Office, Office of the Special Assistant for National Security Affairs, Records, 1952–1961, FBI Series, Box 3, Folder S(1), Eisenhower Library.

58. See LECH, *supra* note 20, at 212–13.

59. See *id.* (listing the servicemen prosecuted). See generally George S. Prugh, Jr., *The Code of Conduct for Members of the Armed Forces*, 56 COLUM. L. REV. 678, 678–707 (1956); George S. Prugh, Jr., *Prisoners at War: The POW Battleground*, 60 DICK. L. REV. 123, 123–38 (1956).

60. See LECH, *supra* note 20, at 212–15. Lech strongly critiques the inconsistency in the handling of the courts-martial of the fourteen soldiers who had been Korean War POWs. Lech cites the decentralization of the process, which yielded disparate results in

Despite the UCMJ's goal of standardizing criminal procedure across the Department of Defense, the Code preserved the prosecutorial discretion of commanders, subject to the guidance provided by each branch of service.⁶¹ The absence of a centralized authority to control investigation and prosecution left the Air Force, the Army, and the Navy to make their own decisions about whether or not to pursue courts-martial. Every one of the POWs court-martialed was in the Army, a distinction partly explained by Army troops' disproportionate representation among the prisoners. There were 224 men each from the Air Force and Marine Corps and 31 from the Navy among the 4,000 repatriated POWs; the remainder of the repatriated prisoners were Army troops.⁶² Service-specific policies, as well as overall numbers, also determined the fate of former prisoners. The Air Force, top-heavy with officers and nervous about protecting the secrecy and legitimacy of its programs, was much more reluctant to prosecute returning POWs than the Army.⁶³ No repatriated Air Force personnel were court-martialed, nor were any of the 134 Air Force officers who refused to fly assigned wartime missions in 1952.⁶⁴ This "fear of flying" incident involved less than one percent of the Air Force personnel qualified to fly, but the

cases with similar facts. *Id.* at 214. He also notes the ability of certain soldiers who had passed their enlistment period to avoid a military trial by simply accepting their discharge. *Id.* at 214-15.

61. See, e.g., GENEROUS, *supra* note 3, at 34-53 (discussing the debate over "command control"). Critics of the Cold War military justice system have derided the extent of commanders' discretion to prosecute offenses. See generally LUTHER C. WEST, THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM (1977) (detailing the pernicious effects of commanders' influence on military lawyers and courts-martial outcomes). For more recent critiques, see generally Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. MICH. ST. U. DETROIT C. L. 57, 117-18 (discussing the problem of disparate outcomes in prosecution for similar offences because of prosecutorial discretion); Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 AM. J. CRIM. L. 395 (1992); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481 (1999).

62. See U.S. DEP'T OF DEFENSE, *supra* note 36, at 81. One Marine Corps officer avoided court-martial when a court of inquiry cleared him, though the investigation effectively ended his career. See LECH, *supra* note 20, at 266-67 (noting the stigma faced by Colonel Frank Schwable after the war).

63. See Hillman, *supra* note 5, at 93-97 (discussing the difference in court-martial rates between the branches of the armed forces).

64. On the fear of flying incident, see VANCE O. MITCHELL, AIR FORCE OFFICERS: PERSONNEL POLICY DEVELOPMENT, 1944-1974, at 92-98 (1996). See SNYDER, *supra* note 43, at 146 (arguing that the relatively lax regulations of the Air Force, along with other relevant evidence of the collaboration of POWs who were not charged at court-martial, was suppressed at the POW trials).

publicity it generated and the precedent it set caused great concern among military leaders.⁶⁵ The dissenting pilots included sixty-seven officers training to fly the B-29 bomber for General Curtis LeMay's Strategic Air Command.⁶⁶ LeMay favored prosecuting the resisters, most of whom were reservists with families and civilian careers who had been recalled to duty for the Korean War.⁶⁷ In April 1952, twelve officers were charged at court-martial. But when six of the accused went public to allege maltreatment by the Air Force, the Secretary of the Air Force ordered the courts-martial be stopped.⁶⁸ The pilots ended up with administrative discharges rather than punitive dismissals, sparing the officers the humiliation of courts-martial and the Air Force the spectacle of criminal trials.⁶⁹ Army leaders, however, adopted more heavy-handed tactics, hoping to make examples of a few collaborating prisoners and willing to risk a public relations backlash.

The extremely selective nature of the POW courts-martial reveals how this reduced use of court-martial made military trials more rare but also more damaging to the careers and reputations of servicemembers who were prosecuted. Although the reforms of the UCMJ were intended to standardize and legalize military justice, the decision to prosecute a handful of repatriated POWs demonstrates that courts-martial still operated in arbitrary, politicized ways.

IV. "THE ACCUSED WEAKENED WHEN OTHERS STOOD FAST": THE CASES OF TWO CORPORALS

The prisoners who appeared to collaborate willingly with the indoctrination program of the prison camps, termed "progressives" by the Chinese and by the other POWs, were at greatest risk of court-martial after the war.⁷⁰ POWs convicted for collaborating with the enemy were punished through dishonorable discharges and prison terms ranging from two years to life, though most were released by parole boards after a few years of confinement in military prisons.⁷¹ Seven of the fourteen courts-martial of POWs resulted in extensive

65. See MITCHELL, *supra* note 64, at 92–98.

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.*

70. See LECH, *supra* note 20, at 5.

71. See *id.* at 264–76 (discussing the fate of each court-martialed POW). For a narrative account of Ronald Alley's effort to clear his name and a crusade taken up by his family, several politicians, and a journalist after his death, see generally SNYDER, *supra* note 43.

appellate records, six of which involved explicit charges of political dissent, including making statements against the interests of the United States and then publishing, broadcasting, or otherwise drawing attention to such statements.⁷² This Part analyzes the appellate record of these courts-martial for insight into both the behavior that compromised the military careers of the POWs and cost some their postwar freedom and the armed forces' rationale for pursuing charges against these repatriated prisoners.

The cases of Corporals Edward M. Dickenson and Claude J. Batchelor set the tone for other POW trials.⁷³ Because of the publicity that attended their intertwined trials, the lengthy appellate records their convictions generated, and their modest enlisted rank (nine of the fourteen prosecutions targeted enlisted troops), their courts-martial exemplify the challenges facing prosecutors, defense counsel, judges, and commanders in the POW cases.⁷⁴ Batchelor and Dickenson were inexperienced troops captured soon after the start of the war.⁷⁵ Each led Communist indoctrination efforts among fellow troops at a prison camp in Pyoktong, North Korea, and each initially refused repatriation, belatedly returning to United States custody, Dickenson in October 1953 and Batchelor in January 1954.⁷⁶ The young men were charged with similar crimes, convicted, and

72. See *United States v. Fleming*, 23 C.M.R. 7, 11–12 (A.B.R. 1957), *aff'd*, 7 C.M.A. 543 (1957); *United States v. Olson*, 20 C.M.R. 461 (A.B.R. 1955), *aff'd*, 7 C.M.A. 460 (1957); *United States v. Gallagher*, 21 C.M.R. 435, 438 (A.B.R. 1956), *rev'd*, *United States v. Gallagher*, 7 C.M.A. 506 (1956); *United States v. Batchelor*, 22 C.M.R. 144, 149 (1956); *United States v. Batchelor*, 19 C.M.R. 452, 464 (A.B.R. 1955), *aff'd*, 7 C.M.A. 354 (1956); *United States v. Dickenson*, 17 C.M.R. 438, 441 (A.B.R. 1954), *aff'd*, 6 C.M.A. 438 (1955); *United States v. Bayes*, 22 C.M.R. 487, 488 (A.B.R. 1956); *United States v. Floyd*, 18 C.M.R. 362, 363 (A.B.R. 1955). *Floyd* is the only case that did not include a charge of collaboration with the enemy.

73. The trials of Specialist Third Class Thomas Bayes and Master Sergeant William H. Olson involved charges and claims on appeal similar to those that appear in *Batchelor*. Sergeant James C. Gallagher was convicted of unpremeditated murder for throwing sick and helpless prisoners out of his tent and into cold winter nights to freeze to death, but Gallagher was also charged with cooperating with the camp guards in a manner similar to Batchelor. See *Framing*, 23 C.M.R. at 596. Gallagher was sentenced to a dishonorable discharge, total forfeiture of pay, and confinement for life. See *Gallagher*, 7 C.M.A. at 507.

74. For a list of the name and rank of each soldier court-martialed for their actions in POW camps, see LECH, *supra* note 20, at 212–13. Private First Class Rothwell Floyd was the only soldier of a grade lower than corporal to face court-martial—and his is also the only case in which charges of malicious crimes in POW camps did not include political offenses. Because soldiers were sometimes promoted during their imprisonments and then demoted after conviction at court-martial, their ranks vary in documents that appear in the appellate records. I refer to POWs by the ranks they held at the time of their captures.

75. See *id.* at 33–37.

76. See *id.* at 189–90.

sentenced to long prison terms.⁷⁷ Their cases reveal the mix of individual hardship, global politics, personal enmity, and public relations that shaped the prosecution of collaboration at court-martial during the Cold War. The armed forces attempted to use courts-martial, in highly selective fashion, to bolster the impression of steadfast, loyal young troops while disregarding the possibility of legitimate criticism of the American political economy.

A. *Captured*

Young, uneducated, and poorly trained, neither Batchelor nor Dickenson anticipated the ordeal the Korean War would bring. Claude Batchelor was the second of eight children born to a poor family in a small town near Waco, Texas.⁷⁸ Restless, he quit school and enlisted in the Army at the age of sixteen.⁷⁹ Sent to Japan in November 1948, Batchelor was assigned to play trumpet in the First Cavalry Division band and soon married a Japanese woman.⁸⁰ When war broke out in July 1950, he found himself en route to Korea as an infantryman in the Eighth Cavalry.⁸¹ In November 1950, after several months of fighting, Batchelor and the other members of his patrol were captured by Chinese forces.⁸² Singled out as a leader among the POWs by the Chinese and flattered by the attention, Batchelor chaired a prisoners' "Peace Committee," led discussion groups intended to teach the principles of communism, confessed to alleged wartime atrocities (including "germ warfare") committed by Americans, and lectured on the injustices of the Rosenbergs' trial, Jim Crow laws, and the Ku Klux Klan.⁸³ An October 1952 letter that Batchelor sent to his hometown newspaper, *The Winkler County News* in Kermit, Texas, detailed the evils of American biological warfare and capitalism.⁸⁴ Batchelor also testified that he had intended to continue studying communism upon his return to the

77. *See id.* at 266–68.

78. *See id.* at 33.

79. *See id.*

80. *See id.* at 33–34.

81. *See id.* at 34.

82. *See id.* at 34–36 (describing the events leading to Batchelor's capture).

83. *See United States v. Batchelor*, 19 C.M.R. 452, 466 (A.B.R. 1955), *aff'd*, 7 C.M.A. 354 (1956). The record focuses in particular on Batchelor's statements about the U.S. practice of germ warfare, right down to details about ants infected with chemical agents. *See id.* at 482. This was a key issue for the Chinese and North Koreans; quite a few Americans, including the Marine pilot Colonel Schwable, spoke out about the extent of American biological warfare. *See LECH, supra* note 20, at 173–78 (describing the interrogation of Schwable that led to his "confession" of germ warfare).

84. *Batchelor*, 19 C.M.R. at 481–82.

United States and that he had made preliminary plans for creating a Communist organization of former American POWs.⁸⁵

Like Batchelor, Edward Dickenson was assigned to the over-matched forces of the rapidly disintegrating Eighth Cavalry in the winter of 1950.⁸⁶ He surrendered to North Korean forces in November 1950 after losing contact with his company.⁸⁷ One of thirteen children born to a working-class Virginia family, Dickenson completed school through the sixth grade.⁸⁸ At age twenty, he was two years older than Batchelor when captured but had been in the Army only seven months.⁸⁹ Dickenson was another "progressive" in the camps; he led pro-Communist discussion groups, sent recordings to his parents criticizing the United States, wrote editorials to his hometown newspaper (*The Post* in Big Stone Gap, Virginia), and informed his captors about other prisoners' escape plans.⁹⁰

In the camps, both men seemed willing to speak and write about the shortcomings of the United States and eager to gain the approval of their captors. Their cooperation brought extra food, money, cigarettes, and liquor from guards and may have worsened conditions for other prisoners.⁹¹ Some POWs testified that Batchelor had helped them by sharing food and cigarettes, but others accused him of reporting to camp authorities on the activities of less cooperative soldiers.⁹² Dickenson's testimony about Batchelor's role in the Chinese "trial" of an American POW proved especially damning.⁹³ According to Dickenson, Batchelor had ingratiated himself with the Communist camp leaders by recommending that an American POW, considered a spy by the guards, be shot for his disloyalty to communism.⁹⁴ That sort of behavior crossed the boundary between the compromises that soldiers were expected to make in order to

85. *Id.* at 473-81.

86. *See* LECH, *supra* note 20, at 36; *United States v. Dickenson*, 17 C.M.R. 438, 443 (A.B.R. 1954), *aff'd*, 6 C.M.A. 438, 455 (1955).

87. *See* LECH, *supra* note 20, at 36.

88. *See id.*

89. *See id.*

90. *See* *United States v. Dickenson*, 17 C.M.R. 438, 442 (A.B.R. 1954), *aff'd*, 6 C.M.A. 438, 455 (1955).

91. *See* LECH, *supra* note 20, at 155-56.

92. *See id.* at 196.

93. *See* *United States v. Batchelor*, 7 C.M.A. 354, 362 (1956).

94. The prisoner who Batchelor condemned was not killed; Master Sergeant Wilburn Watson survived to join Dickenson in testifying at Batchelor's court-martial. *See Batchelor*, 19 C.M.R. 452, 492, *aff'd*, 7 C.M.A. at 361-62. Batchelor denied that he intended any harm to come to Watson. *See* LECH, *supra* note 20, at 191-92 (discussing Watson's experience).

survive and the realm of the criminal, a judgment that would become clear at Batchelor's trial.

The impoverished backgrounds, poor military preparedness, and limited education of these two corporals made them receptive to the Communist education they received in the POW camps. It also helped lead to their capture and to their inability to marshal enough support upon their returns to the United States to avoid the disgrace of criminal prosecution. Many other servicemembers during the Cold War suffered from similar social and economic disability during and after their military careers, but few were subjected to the harsh consequences visited upon Batchelor and Dickenson.

B. Court-Martialed

After their delayed repatriation, Batchelor and Dickenson were interviewed at length by American intelligence officers and psychiatrists who already knew quite a lot about the corporals from interrogations of other POWs.⁹⁵ Both men cooperated; Batchelor even provided a 148-page description of his conduct in the camps that was later admitted into evidence—over the strenuous objections of his defense counsel—at his court-martial.⁹⁶ Soon after their interviews with Army intelligence, the corporals became the subjects of pre-trial criminal investigations resulting in massive reports recommending prosecution.⁹⁷ This Part traces their courts-martial and appeals, analyzing the meaning and impact of the judicial opinions the POW cases elicited.

Dickenson's court-martial, the first POW trial involving charges of collaboration, took place in 1954, while the Army-McCarthy hearings were in session.⁹⁸ Despite the military's promise of immunity from prosecution as part of his agreement to return to the United States, Dickenson was convicted and sentenced to ten years confinement.⁹⁹ The Secretary of the Army eventually reduced his sentence to five years, and he was released from Fort Leavenworth

95. See LECH, *supra* note 20, at 203–12 (describing the post-repatriation interrogation of the POWs).

96. See *id.* at 242.

97. *Id.* at 217–18.

98. See *id.* at 237. For a discussion of McCarthy's targeting of the Army, see ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 260–65 (1998). See also ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE* 243–69 (1987) (discussing the Army-McCarthy hearings as “unique annals of Congress and the nation”); DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* 355–471 (1983) (discussing the Army-McCarthy hearings).

99. See LECH, *supra* note 20, at 238, 266.

after serving three and a half years.¹⁰⁰

Batchelor's court-martial followed Dickenson's in September 1954.¹⁰¹ It took nearly twice as long, provoked more complex judicial rulings on evidentiary standards, and involved testimony from dozens of psychiatrists and other POWs.¹⁰² Because the opinions in Batchelor's case are more detailed and expansive, and because they cover virtually all of the issues raised in Dickenson's and other POW courts-martial, the balance of this Part focuses on the trial and appeals of the unfortunate Claude Batchelor.

Batchelor chose a civilian attorney to defend him,¹⁰³ reflecting the doubt of many accused servicemembers about the true allegiances of military attorneys.¹⁰⁴ He rejected the two experienced judge advocates assigned to act as his defense counsel under the UCMJ's guarantee of free legal representation from the pre-trial investigation through the appeals process.¹⁰⁵ His legal team acted aggressively on his behalf, submitting pre-trial discovery requests for thousands of government documents—most of which were denied on grounds that the material requested was not relevant to the charges—and pursuing simultaneously a number of strategies at trial.¹⁰⁶

One of those strategies was the brainwashing defense, also known as the "fence complex syndrome."¹⁰⁷ Batchelor's defense counsel sought to blame Batchelor's failures in the camp on the very same phenomenon that many military leaders as well as journalists believed responsible for most incidents of prisoner cooperation with Communist captors.¹⁰⁸ Dr. Leon Freedom, a psychiatrist, described Batchelor's "political psychosis," a sort of compartmentalized paranoia that prevented him from distinguishing right from wrong "in the political sphere."¹⁰⁹ Neither Dr. Freedom nor Batchelor himself, however, managed to create a reasonable doubt about his guilt in the minds of the members of his court-martial. Batchelor's court-martial, like the military itself, chose to blame the corporal's own weakness for his compliance with camp guards rather than to recognize the

100. *See id.*

101. *See id.* at 241.

102. *See United States v. Batchelor*, 19 C.M.R. 452, 489 (A.B.R. 1955), *aff'd*, 7 C.M.A. 354 (1956).

103. *See LECH*, *supra* note 20, at 241.

104. *See id.* at 236.

105. *See id.*

106. *See Batchelor*, 19 C.M.R. at 513.

107. *Id.* at 489.

108. *Id.*

109. *Batchelor*, 19 C.M.R. at 489.

power of communist indoctrination or the authority of psychiatric experts.

Despite widespread public sympathy for the plight of court-martialed POWs, Corporal Batchelor was convicted of "aiding the enemy," "misconduct as a prisoner of war," and violating article 134, the UCMJ's general article.¹¹⁰ Sentenced to a dishonorable discharge, total forfeiture of pay, and twenty years confinement, he spent four and half years in military prison before his parole.¹¹¹ A trumpet player turned infantryman, Batchelor had finally managed to impress his school teachers. Because these particular teachers were communists in a POW camp, he was caught in the vise of Cold War politics and paid a steep price for his compliance.

*United States v. Batchelor*¹¹² elicited more than seventy pages of opinions from military appellate courts.¹¹³ It provoked judicial pronouncements on mental competence, jurisdiction, and a host of other legal issues.¹¹⁴ The military's highest court conceded that evidence of Batchelor's guilt was "overwhelming" but still carefully analyzed procedural issues raised by his attorneys.¹¹⁵ These included conflicts between the Geneva Conventions and the UCMJ concerning jurisdiction over the offenses of POWs, doubt over whether Batchelor had accepted an offer of amnesty by returning to American custody, and uncertainty about the consequences of the psychological theories of coercion advanced at trial.¹¹⁶ The Court of Military Appeals's measured tone and exhaustive review of Batchelor's case shows how seriously the new military courts viewed their responsibility to ensure procedural justice at court-martial, and how important the POW cases were to the new military justice system's effort to build legitimacy and develop military legal doctrine.

110. See LECH, *supra* note 20, at 237–38 (recounting public support for Dickenson in particular); see also Court-Martial Appeal Letters, Box 254, General File Series of White House Central Files, Eisenhower Library (documenting public support for Dickenson and other POWs). For Batchelor's sentence and ultimate punishment after clemency and parole board actions, see LECH, *supra* note 20, at 267–68.

111. See LECH, *supra* note 20, at 267–68.

112. 19 C.M.R. 452 (A.B.R. 1955), *aff'd*, 7 C.M.A. 354 (1956).

113. See *Batchelor*, 19 C.M.R. 452 (A.B.R. 1955).

114. See *id.*

115. *United States v. Batchelor*, 7 C.M.A. 354, 359 (1956).

116. See *Batchelor*, 19 C.M.R. at 492, 506.

V. "THAT WHICH HAS BEEN OUR HERITAGE": PUNISHING DISLOYALTY, PROTECTING THE NATION

In addition to their key place in the historical development of a new military criminal justice system, the POW trials raised deeper issues of Cold War politics and American culture. Both the courts-martial themselves and media coverage of them revolved around why Batchelor and others "turned," and what sort of crime their acts constituted. This Section analyzes two theories put forth to explain why some POWs cooperated with the communist program in the camps, then assesses the legal reasoning that led to their prosecution for military-specific charges at court-martial rather than for treason in federal court.

A. *Brainwashed?*

The question lurking behind judicial opinions, media coverage, and psychological studies of the POWs was why Batchelor and other "progressives" allegedly "weakened when others stood fast."¹¹⁷ Because the Army refused to acknowledge that most captured soldiers cooperated with Communist indoctrination in order to survive in the camps, military and civilian observers sought to understand, and then remedy, the situations or traits that made soldiers vulnerable to Communist coercion. Perhaps the simplest explanation of all—that Communist thought was genuinely appealing to some Americans—was dismissed out of hand. Instead, soldiers who embraced Communism were assumed to be either helpless victims or damnable traitors. Allegations of brainwashing, and recognition of the suffering imposed on those who resisted communist indoctrination, partly answered the question about the apparent political vulnerability of POWs. But the appeal of Communist doctrine itself contributed to the alleged "weakness" of soldiers in the camps.

The Communist critique of the United States could not help but resonate with at least some American soldiers. Communism questioned the wisdom of American involvement in a war that, truth be told, had gone very badly for U.N. troops. The Communist syllabus learned and then taught by POWs like Batchelor and Dickenson included substantive critiques of racial inequality and the uneven distribution of wealth in the United States.¹¹⁸ Claude

117. *Batchelor*, 7 C.M.A. at 372.

118. See *Batchelor*, 19 C.M.R. at 466, *aff'd*, 7 C.M.A. 354 (1956); *United States v.*

Batchelor himself explained that three years of reading Communist literature had changed his beliefs, though he was quick to add that his return to the United States led him to reconsider his new political ideology.¹¹⁹ Most captured servicemembers were not the sons of privilege; they often joined the Army to escape the social and economic limitations of their families and communities.¹²⁰ The FBI investigated and reported on “any pertinent derogatory information” discovered about the POWs who were investigated for collaboration, including at least a few who had connections to the Communist Party in the United States.¹²¹ But the FBI, along with military leaders and the social scientists who so exhaustively studied the POWs, ignored the class and racial tensions that shaped military culture as well as American society during the post-World War II period. They chose instead to focus on soldiers’ feeble mental state rather than acknowledge the possible appeal of Communist thought to some servicemembers.¹²² Individual soldiers might falter while “others stood fast,” but the military, and the nation as a whole, were unwilling to stand fast and ignore the conversion of Batchelor to an ideology as anathema to American democracy as Communism.

Military officials, social scientists, and journalists instead turned to more elaborate explanations for POW vulnerability. Batchelor’s defense counsel tried to portray his client as mentally incompetent by virtue of “political psychosis” so that Batchelor’s court-martial would see an addled young soldier rather than a bright, committed Communist.¹²³ As the Court of Military Appeals wrote in upholding

Dickenson, 17 C.M.R. 438, 441 (A.B.R. 1954), *aff’d*, 6 C.M.A. 438 (1955); LECH, *supra* note 20, at 98–99 (presenting the twelve-step indoctrination).

119. *Batchelor*, 19 C.M.R. at 470.

120. See LECH, *supra* note 20, at 29–38. On the difficulty of military recruiting in this period, see generally THE DRAFT AND ITS ENEMIES: A DOCUMENTARY HISTORY 159–219 (John O’Sullivan & Alan M. Mecker eds., 1974); GEORGE Q. FLYNN, THE DRAFT, 1940–1973, at 110–65 (1993) (discussing the Korean War draft and changes made to draft policy in the 1950s); JAMES M. GERHARDT, THE DRAFT AND PUBLIC POLICY: ISSUES IN MILITARY MANPOWER PROCUREMENT, 1945–1970 (1971) (discussing the difficulties in meeting military personnel needs in the post-World War II period).

121. See Letter from J. Edgar Hoover to Robert Cutler, Administrative Assistant to the President (May 14, 1953) (available in White House Office Files, Office of the Special Assistant for National Security Affairs, Records, 1952–1961, FBI Series, Box 3, Folder S(1)) (Eisenhower library) (discussing recent POW repatriates) (on file with the North Carolina Law Review). Hoover writes that the FBI review found “derogatory information” on only a dozen of the repatriates, none of whom were court-martialed. See *id.*

122. On the blind spot of social scientists regarding race, ethnic, and class divisions among the returning POWs, see ROBIN, *supra* note 14, at 181.

123. *Batchelor*, 19 C.M.R. at 489–94.

his conviction, "[A]t best, he was a victim of his own selfish desire to improve his internment at the expense of other servicemen; at worst, he was a soldier who betrayed his cause."¹²⁴ At best an opportunist, at worst a traitor, Batchelor was seen as a potentially dangerous convert who intended to organize a Communist cell in the United States. The threat he posed to American leaders struck too close to one of their greatest fears, that of subversion from within, to be overlooked as a consequence of coercion, abuse, or psychological disorder.

B. *Not Quite Treason*

The White House and the Attorney General considered the possibility of charging Batchelor and the other "turncoat GI's" with treason in federal court rather than with lesser crimes at court-martial.¹²⁵ Government prosecutors during the Cold War often had a choice of prosecuting explicitly political crimes in either federal or military court. Limitations attached to each forum. For example, although the UCMJ permitted the prosecution of capital crimes that occurred within the geographic boundaries of the United States at court-martial during peacetime—which had not been possible under earlier regimes of military law—the Code still limited sharply the cases in which the death penalty could be imposed.¹²⁶ The UCMJ's general article, under which suspected spies were often charged, was explicitly limited to "crimes and offenses not capital."¹²⁷ Federal prosecutors also lacked a criminal charge as all-encompassing as the UCMJ's general article, which could make the drafting of charges more difficult. In 1954, the Espionage Act, a federal law under which servicemembers as well as civilians could be charged, was amended to allow prosecutors to seek the death penalty for peacetime violations,

124. *United States v. Batchelor*, 7 C.M.A. 354, 372 (1956).

125. See Notes on Press Conference Briefing (July 6, 1955), Dwight D. Eisenhower Papers, Whitman File, 1953–1961, Ann Whitman (ACW) Diary Series, Box 6, Folder ACW Diary July 1955 (6), Eisenhower Library (on file with the North Carolina Law Review). Eisenhower makes clear that the rules on handing "Turncoat GI's" ought to be public and notes that "some legal question whether they can be tried for treason or whether they should be tried under the Court of Military Justice. Attorney General wants to reserve his decision." See *id.*

126. See Uniform Code of Military Justice, arts. 18, 52, 10 U.S.C. §§ 801–894 (2000) (restricting the imposition of death except as specifically authorized elsewhere in the Code). For a discussion of the UCMJ's extension of jurisdiction over capital crimes committed during peacetime, see generally Robert B. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 435–53 (1960).

127. Uniform Code of Military Justice art. 134, 10 U.S.C. § 934.

which made capital punishment more available in federal than military court.¹²⁸ To complicate matters further, when federal charges were brought at court-martial, military appellate courts had to sort out a jumble of criminal law to determine whether servicemembers could be tried under a military statute (the UCMJ) that specifically disavowed capital offenses, for violations of a civil criminal statute (the Espionage Act) that authorized the death penalty.¹²⁹ Even “peacetime” itself was subject to interpretation; military judges had to define the beginning and end of the undeclared wars in both Korea and Vietnam in order to apply the UCMJ properly, since both substantive crimes and procedural rules specified in the statute were different in peacetime than during war.¹³⁰

In the POW cases, the crime of treason, defined in the Constitution as either “levying War” against the United States or “adhering to their Enemies,” loomed over court-martial proceedings and appeals.¹³¹ The word “treason” was introduced by both a prosecuting attorney and a member of the court-martial panel during Batchelor’s trial, making explicit the connection between the charged military crimes of collaboration and the ultimate political crime.¹³² Practically, treason was rarely charged because of the constitutional constraints on its prosecution.¹³³ It was not a specified crime under the UCMJ and has not been charged at modern courts-martial. In addition, the fact that the acts of the POWs had taken place while

128. See Espionage and Sabotage Act of 1954, Pub. L. No. 777, 68 Stat. 1216 (codified as amended at 18 U.S.C. § 794 (2000)). See generally Elizabeth B. Bazan, *Espionage and the Death Penalty*, 42 FED. B. NEWS & J. 615, 618 (1994) (discussing changes to 18 U.S.C. § 794 regarding capital punishment and the death penalty); Paul D. Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes Is Unnecessary: It Just Needs a Little Re-Enforcement*, 24 WAKE FOREST L. REV. 881 (1989) (discussing the constitutional validity of the death penalty in espionage cases).

129. See, e.g., *United States v. French*, 25 C.M.R. 851, 866–87 (A.F.B.R. 1958), *aff’d*, 10 C.M.A. 171 (1959).

130. See Major Wayne Anderson, *Unauthorized Absences*, ARMY LAW., June 1989, 3, at 15 (discussing military court rulings on the definition of “in time of war” for Korea and Vietnam).

131. U.S. CONST. art. III, § 3. For a history of treason in the United States, see generally AMERICAN POLITICAL TRIALS (Michal R. Belknap ed., 1981) (discussing several prominent treason cases); JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971). On the blurring of lines between treason and other crimes, see Ryan Norwood, Note, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820, 820 & n.26 (2002) (discussing the difference between treason and other crimes).

132. See LECH, *supra* note 20, at 241–42.

133. See GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 42 (1993) (describing the harm of treason as constitutionally defined and less concrete than that of other criminal offenses).

imprisoned by enemy forces caused considerable doubt as to whether their misdeeds legally constituted treason.¹³⁴

Although the court-martialed POWs did not face the possibility of capital punishment, the capital crime of treason influenced the tone and outcome of the trials.¹³⁵ As at least one observer of American political crime has noted, treason punishes lapses of loyalty to the state, breaches of “a relationship of required loyalty.”¹³⁶ Of all Americans, Cold War servicemembers were among those required to have the most unchallenged loyalty to the United States. The charges brought against the collaborating POWs were stand-ins for the charge of “adhering” to an enemy of the United States—albeit not an enemy by virtue of a declared war—that a prosecution for treason would have exposed. The stigma of disloyalty, on top of the taint of political corruption and weakness that tarnished the public image of Korean War POWs, made it very difficult for accused servicemembers to convince the fellow soldiers who judged them of their innocence.

CONCLUSION

The political atmosphere that led military prosecutors to try young men like Batchelor and Dickenson as traitors did not survive the Cold War years. By the end of the Vietnam War, the Army's attitude toward using the military justice system to punish collaborating POWs had shifted closer to the Air Force's perspective in the “fear of flying” episode. The broader waves of dissent that came with the Vietnam War and the social and cultural changes of the 1960s made criminal prosecution for political dissent more difficult to justify. The courts-martial of Korean War POWs had been costly, painful, and embarrassing. Afterwards, criminal prosecution was considered an inappropriate and overly punitive means of dealing with the issue of delayed repatriates and prisoners who cooperated with their captors.

Two decades later, only one late-returning prisoner from the

134. Some believe the actions of imprisoned soldiers legally constituted treason, arguing that the POWs committed overt acts before many witnesses with the intent to betray the United States and give aid and comfort to enemies of the state. See Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 ST. LOUIS L. REV. 181, 194–204 (arguing in favor of treason charges for Korean POW Batchelor and Vietnam POW Garwood).

135. See Uniform Code of Military Justice, arts. 18, 52, 10 U.S.C. §§ 801–894 (2000) (restricting the imposition of death except as specifically authorized elsewhere in the Code). For the UCMJ's extension of jurisdiction over capital crimes committed during peacetime, see Duke & Vogel, *supra* note 125, at 435–58.

136. FLETCHER, *supra* note 132, at 42.

Vietnam War was prosecuted and convicted.¹³⁷ Private First Class Robert R. Garwood was the only Vietnam POW tried for collaborating with the enemy.¹³⁸ Although the geopolitical and military situation of the Vietnam War was not the same as in the Korean War—the protests of the Vietnam era had no parallels in the 1950s, and the Vietnam War resulted in some 700, not 7,000 POWs, as the Korean War had—Garwood's pre-service life and wartime experience echoed that of Batchelor and Dickenson. Frequently in trouble as a teenager and anxious to escape an unsteady home life, Garwood enlisted in the Marine Corps in 1963 as an alternative to an Indianapolis juvenile detention center.¹³⁹ He was captured in Vietnam in 1965, a young, inexperienced soldier much like Batchelor and Dickenson.¹⁴⁰ Garwood lived with North Vietnamese and Chinese forces until 1979, refusing repatriation and adopting Vietnamese language, dress, and customs.¹⁴¹ The Marine Corps tracked his activities from 1966 until he returned to United States custody.¹⁴² Two years after his voluntary return, Garwood was court-martialed in a trial extending over eleven months, including ninety-two days of court, and resulting in sixteen volumes of trial record and exhibits.¹⁴³ Garwood employed multiple defense counsel who countered the testimony of other POWs about Garwood's preferential treatment and relative freedom in Vietnam by introducing psychiatric testimony that doubted Garwood's mental competence and suggested a possible brain injury.¹⁴⁴ The trials and appeals also inspired allegations of judicial misconduct and selective prosecution, attracting intense media attention.¹⁴⁵

Like Batchelor and Dickenson, the military's treatment of Garwood was not the norm; most returning POWs, even those who had joined peace committees and signed confessions of misconduct while imprisoned, were not prosecuted for military crimes.¹⁴⁶ But because Garwood manifested little resistance to Communist

137. See *United States v. Garwood*, 16 M.J. 863, 865 (N-M.C.M.R. 1983), *aff'd*, 20 M.J. 148 (C.M.A. 1985).

138. *Garwood*, 16 M.J. at 865, *aff'd*, 20 M.J. 148 (C.M.A. 1985).

139. See WINSTON GROOM & DUNCAN SPENCER, *CONVERSATIONS WITH THE ENEMY: THE STORY OF PFC ROBERT GARWOOD* 107–12 (1983).

140. See *id.* at 13–20.

141. See *generally id.* (presenting a narrative of Garwood's experience).

142. See *id.* at 334.

143. See *Garwood*, 16 M.J. at 865.

144. See GROOM & SPENCER, *supra* note 138, at 347.

145. See *id.* at 347–94 (presenting trial tactics and chronology).

146. *Id.* at 335.

indoctrination, because he spurned repatriation with other prisoners in 1973, and, perhaps most importantly, because other POWs “hated him while they were in the camps” and were willing to testify against him, he was singled out for punishment.¹⁴⁷ The Marine Corps had not pursued courts-martial against any of the Marines who cooperated in Korean War prison camps, but by 1979, the Corps was unwilling to excuse the highly publicized behavior of a troubled soldier, notwithstanding the costs of a lengthy criminal trial.¹⁴⁸ Still, Garwood remained the exception, not the rule. By the 1970s, the military actively sought to minimize the possibility of embarrassing, politicized criminal trials and appeals.¹⁴⁹

The crimes of Batchelor, Dickenson, Garwood, and other court-martialed POWs were caused by a combination of Communist coercion and the servicemen’s lack of education, poor training, and inability to forge protective friendships with fellow troops. These young men were blamed for the military’s cultural and institutional failures even when other servicemembers with apparently greater culpability and whose cases attracted comparable publicity—such as the United States Air Force germ warfare contingent—escaped without criminal censure.¹⁵⁰ Military courts handled the complex legal issues of these cases with diligence and gravity, but the selective prosecution and harsh punishment of the POW courts-martial did not fulfill the UCMJ’s promise of standardized justice and procedural fairness.

The Korean War POW cases became important precedents for a legal process in transition to a more “civilianized” criminal justice system in Cold War America. Decisions in Batchelor’s and the cases of other POWs established key precedents in the development of modern military criminal justice by analyzing the ramifications of the First Amendment for servicemembers’ right to speak and act,¹⁵¹ the

147. *Id.* at 340–44.

148. *Id.* at 335.

149. *Id.*

150. See LECH, *supra* note 20, at 266.

151. See, e.g., *United States v. Bayes*, 22 C.M.R. 487, 489–91 (A.B.R. 1956) (analyzing a free speech challenge to an article 104 charge). The Court of Military Appeals relied on *United States v. Voorhees*, another Korean War case, in rejecting Bayes’s appeal. 4 C.M.A. 509 (1954). Lieutenant Colonel Melvin B. Voorhees had been convicted and dismissed for publishing a book about his experiences in Korea without the approval of military authorities. *Id.* at 515–16. His case prompted the court to elaborate on the limited right to free speech that could be claimed by servicemembers. *Id.* at 521. On the intent required for a conviction under article 104, see *United States v. Olson*, 20 C.M.R. 461, 464 (A.B.R. 1955), *aff’d*, 7 C.M.A. 460 (1957). See also *United States v. Levy*, 39 C.M.R. 672, 677–81 (A.B.R. 1968) (the case of Army doctor Howard Levy during the

extent of criminal jurisdiction over POWs,¹⁵² and the determination of mental competence.¹⁵³ Yet these cases have been overlooked, much like the war—the “forgotten war”—from which they came. For their role in the evolution of military legal jurisprudence as well as the window they offer into the complex political and legal terrain of the United States during the Cold War, the Korean War POW cases deserve to be more than a forgotten chapter in the history of criminal prosecutions for disloyalty.

Vietnam War). See generally Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839 (discussing the Levy trial and related social issues).

152. See, e.g., *United States v. Garwood*, 20 M.J. 148, 149 (1985) (accepting the validity of UCMJ's criminal statutes over prisoners in POW camps).

153. See, e.g., *United States v. Batchelor*, 19 C.M.R. 452, 489–98 (A.B.R. 1955) (analyzing the brainwashing defense put on by Corporal Batchelor), *aff'd*, 7 C.M.A. 354 (1956).

