Evolution of the Military "Judge"

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EVOLUTION OF THE MILITARY "JUDGE"

E A R L  S N Y D E R *

Perhaps one of the most difficult tasks extant is to per-
suade a basically monolithic organization — this nation's
armed forces — to accept a lawyer as an almost omniscient,
 omnipotent judge in its system of military trial courts.

In fact, in over 180 years it has not been done. But it is
not surprising. Dick the Butcher (articulate follower
of monolithic-minded Jack Cade) expressed it neatly — courtesy
of Shakespeare, of course: "The first thing we do, let's kill all
the lawyers." ¹

This may represent the view of some of today's armed
forces' leaders of all ranks. They just do not want their
disciplinary system mucked up by, they assert, knit-picking,
perverse, wrong-headed lawyers. And particularly they do
not want a lawyer in a military court in a position analogous
to a judge in a civilian court.

But the armed forces are slowly and, more or less, grace-
fully bowing to the inevitable. Through acts of Congress
and decisions of the Court of Military Appeals (the highest
tribunal in the military court hierarchy — composed of 3
civilian judges) the law officer of a general court-martial²
is gradually evolving into the judge of a military trial court.

It has been a fairly lengthy and rocky road to achieve
this.

THE EARLIER VIEW

For the purpose of this article the starting point may be
taken as the Articles of War enacted in 1920 (and amended
in 1937 and 1942).³ Article of War 8 provided, in part:

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ica; member of the bar, Indiana; barrister-at-law, Gray's Inn, England;
judge advocate, U. S. Air Force. The views expressed in this article are
those of the author and should in no way be attributed to the Department
of the Air Force or Department of Defense.
²The other two courts in the military juridical hierarchy — a special
and a summary court-martial — are essentially lay courts.
³Army Reorganization Act of 1920, sec. 1, ch. II, 41 Stat. 787. If
any reader wants to pursue an interesting facet of military juridical
history having to do with members of courts-martial and the role of the

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The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose, the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specifically qualified to perform the duties of law member. The law member, in addition to his duties as the President may by regulations prescribe. (Italics supplied.)

Congress was additionally helpful in giving the law member some quasi-judicial authority in Article of War 31. But it also proscribed his authority with an appalling list of matters on which he could be overturned by the lay members of the court — the judge overruled by the jury, so to speak.

Article of War 31 said, in part:

The law member of the court . . . may rule in open court upon interlocutory questions, other than challenge, arising during the proceeding: . . . And provided further, That if any such ruling be made by the law member of the court upon any interlocutory question other than an objection to the admissibility of evidence offered during the trial, and any member object to the ruling, the court shall likewise be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: Provided further, however, that the phrase 'objection to the admissibility of evidence offered during the trial' as used in the next preceding proviso hereof shall not be construed to include questions as to the order of the introduction of witnesses or other evidence, nor of the recall of witnesses for further examination, nor as to whether expert witnesses shall be admitted or called upon any question, nor as to whether the court shall view the premises where an offense is alleged to have been committed, nor as to the competency of witnesses, as, for instance, of children, witnesses

judge advocate in years past, a gambol through pages 170-204, Winthrop's Military Law and Precedents (2nd ed., 1920 reprint) may be a rewarding experience. There is substantial conceptual difference between the 19th (and early 20th) century and present roles of courts-martial members and the judge advocate. For one thing, there apparently was no military "judge" no law officer or law member — in those earlier times.
alleged to be mentally incompetent, and the like, nor as to the insanity of the accused, or whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or accused required to submit to physical examination, nor whether any argument or statement of counsel for the accused or of the trial judge advocate is improper, nor any ruling in a case involving military strategy or tactics or correct military action; but, upon all these questions arising in the trial, if any member object to any ruling of the law member the court shall be cleared and closed and the question decided by majority vote of the members in the manner aforesaid.

The law member was far from analogous to a civilian judge! In addition, he sat physically with the other members of the court during trial. And he deliberated and voted — in closed session along with the other members — on the guilt or innocence of the accused and the sentence imposed in event of a finding of guilt.

**AFTER WORLD WAR II**

These Articles of War were amended again in 1948.\(^4\) Article of War 31 then read, in part:

The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General’s Corps, or an officer who is a member of the bar of a Federal court or of the highest court of a state of the United States and certified by the Judge Advocate General to be qualified for such detail: *Provided*, that no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform the duties prescribed in Article 31 hereof and such other duties as the President may by regulations prescribe.

Moreover, definite strides were made in the direction of constituting the law member a quasi-judge in the amendment to Article of War 31. Many of the former restrictions on his authority were lifted.

\(^4\) Act of June 24, 1948 (also known as The Elston Act); 62 Stat. 627.
As amended in 1948 Article of War 31 read, in part:

The law member of a general court-martial . . . shall rule in open court upon interlocutory questions, other than challenge, arising during the proceedings: . . . And provided further, That any such ruling made by the law member of a general court-martial upon any interlocutory question other than a motion for finding of not guilty, or the question of accused’s sanity, shall be final and shall constitute the ruling of the court; . . .

In addition, the law member was given the duty of advising the other court members on the presumption of innocence, reasonable doubt, degrees of guilt and burden of proof.

However, the law member still physically sat with the other members of the court and, in their closed session, deliberated and voted on the guilt or innocence of the accused and the sentence imposed in event of a finding of guilt. (These two matters were not changed by the 1948 amendment.)

It was not until 1951 that a decision of the newly formed United States Court of Military Appeals\(^5\) unequivocally clarified the status of the law member.

In a general court-martial convened May 4, 1951,\(^6\) (and thus governed by the Articles of War, not the Uniform Code of Military Justice\(^7\)) the president of the general court-martial — a mature, experienced army officer, not a lawyer — decided several issues that should have been decided by the law member.

He denied a motion to dismiss one of the charges against the accused; ruled on the admissibility of a confession; denied (at the conclusion of the government’s case) another motion

\(^5\) Established under the Uniform Code of Military Justice, 64 Stat. 129 (1950) 10 U. S. C. 867 (1956). It came into existence May 31, 1951. The three civilian judges are appointed for terms of fifteen years by the President by and with the advice and consent of the Senate. They may be appointed for successive terms.

\(^6\) U. S. v. Berry, 1 USCMA 235, 2 CMR 141 (1951).

\(^7\) By Executive Order 10214, February 8, 1951, (prescribing the Manual for Courts-Martial, United States, 1951) the President provided, in substance, that an act done prior to May 31, 1951, would be charged as a violation of the Articles of War (with respect to the Army and Air Force), not a violation of the Uniform Code of Military Justice. He also provided that any trial begun before May 31, 1951 might be completed in accordance with laws, executive orders and regulations of the armed forces in effect prior to May 31, 1951.
to dismiss one of the charges against the accused; and at the close of the case denied a motion for a finding of not guilty.

The Court of Military Appeals met this onslaught forthrightly. It reversed the conviction of the accused and returned the record of trial to the Army Judge Advocate General so that he might either dismiss the charges or order a rehearing.

The late Judge Brosman — writing for the court — said:

The Articles of War, as amended, and the 1949 Manual [for Courts-Martial] make clear that the law member's position with respect to a court-martial is closely analogous to that of the judge in the criminal law administration of the civilian community.

If the president of a general court-martial — freely selected as he is by the convening authority, possibly more concerned with military discipline than with law administration, and almost certainly less well-informed within the latter sphere under ordinary circumstances — is able to usurp the judge-like functions of the law member, then, we are much afraid, at least one barrier interposed by Congress in the path of what has been popularly characterized as 'command influence' has been weakened, if not removed. 8

The Uniform Code of Military Justice, transforming the law member into the law officer, and the Manual for Courts-Martial, United States—1951 (its executive order companion) did not become effective until May 31, 1951 with respect to all court-martial processes taken on and after that date.

However, Judge Brosman made this case an opportunity to indicate the court's thinking on the role of the law officer under the new Code and Manual for Courts-Martial.

He noted that the only substantial change made by the Code in transforming the law member into the law officer was to prohibit the law officer's participation in the deliberation of the court-martial on the guilt or innocence of the accused (and the sentence to be assessed in event of the former). He also noted that this necessarily imposed on the law officer the duty of instructing the members of the court on the ele-

ments of the offense alleged and charging them as to the presumption of innocence and similar matters.

Significantly, he stated:

The legislative background of the Uniform Code makes clear beyond question Congress' conception of the law officer as a judge to all material intents and purposes. Professor E. M. Morgan, chairman of the Secretary of Defense's committee, whose efforts resulted in the confection and passage of the Code, stated in response to the Congressional Committee inquiry into the place of the law officer: 'Well, the fundamental notion was that the law officer ought to be as near like a civilian judge as it was possible under the circumstances.'...9

UNDER THE UNIFORM CODE OF MILITARY JUSTICE

In the first reported case on this subject under the new Code (decided by an Army board of review) a tentative limit was put on the analogy of law officer to civilian judge.10

In this case the accused was charged with premeditated murder and found guilty of unpremeditated murder. Before the board of review his counsel urged that the law officer committed prejudicial error when he failed (1) to define technical words and words of art (2) to instruct on all essential questions of law involved and raised by the pleadings or evidence and (3) to instruct on the elements of "lesser included offenses" — even though he wasn't requested to do so.11

The board of review said that "... although the law officer's function is rather closely analogous to that of a civilian judge, the two are not coextensive."

It pointed out that the Uniform Code of Military Justice required only that the law officer instruct the court on the elements of the offense charged, presumption of innocence and burden of proof. He may give additional instructions, but he is not required to do so.12

9. Ibid.
10. CM 349601, Baguex, 2 CMR 424 (1952). A board of review is an armed force intermediate appellate tribunal composed of three lawyers, military or civilian, or both. One may petition to appeal from its decision to the Court of Military Appeals. (Under certain circumstances appeal is automatic.)
11. Id. at 433.
12. Id. at 434.
With this relatively minor deviation from the straight and narrow, boards of review and the Court of Military Appeals settled down to what is apparently an almost unbroken line of decisions analogizing the law officer to a judge of a civilian criminal court.

These appellate tribunals have done this explicitly in many cases: they have simply stated (and decided) that the authority and responsibility of the law officer is analogous to that of a civilian judge.13

In other cases, they have done it implicitly in one of two ways: they have held the law officer to a standard of conduct (with regard to the trial in which he is sitting) similar to that to which a civilian judge is held in a trial in which he is sitting; or they have decided he has authority to make certain decisions during the trial which a civilian judge has traditionally made.14

These cases are bottomed on two articles of the Uniform Code of Military Justice which provide for appointment of a law officer on a general court-martial and prescribe his duties.15


14. On the first point, see, e.g., ACM 6695, Gemelli, 11 CMR 690 (1953) (law officer previously acted as staff judge advocate and recommended the case he referred for trial to a general court-martial); CM 393003, Neal, 23 CMR 469 (1956) (law officer took too active a role in questioning witnesses, etc.); CM 395518, Bennamon, 25 CMR 609 (1958) (law officer went beyond impartiality in cross-examination of accused); U. S. v. Solak, 10 USCMA 440, 28 CMR 6 (1959) (unauthorized communication between law officer and court); and U. S. v. Boysen, 11 USCMA 331, 29 CMR 147 (1960) (substitution of one law officer by another during course of trial).

On the second point, see, e.g., CM 350647, Borner, 8 CMR 483 (1952), aff'd. U. S. v. Borner, 3 USCMA 306, 12 CMR 62 (1953) (view of scene of offense within discretion of law officer); U. S. v. Jackson, 3 USCMA 646, 14 CMR 64 (1954) (law officer must direct trial along path of recognized procedure in way reasonably calculated to bring end to trial without prejudice to either party); ACM 7761, Schreiber, 16 CMR 639 (1954), aff'd, U. S. v. Schreiber, 5 USCMA 603, 18 CMR 226 (1955) (law officer had authority to grant change in place of trial); and CM 399282, Cannon, 26 CMR 593 (1958) (law officer responsible for professional decorum of trial and defense counsel).

15. Article 26 says:

"(a) The authority convening a general court-martial shall appoint as law officer thereof an officer who is a member of the bar of a Federal court or the highest court of a State of the United States and who is certified to be qualified for such duty by the Judge Advocate General of the armed forces of which he is a member. No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."
**SOME EXAMPLES**

In a case decided not long after the effective date of the Code, an Air Force board of review had an opportunity to enunciate its view on the status of the law officer.\(^{16}\)

An Air Force captain was convicted of conspiring to defraud the United States through presentation of a false and fraudulent claim. Prior to trial the staff judge advocate to the convening authority of the general court-martial furnished the law officer with a "Memorandum of Legal Authorities." This memorandum contained what the staff judge advocate believed to be authoritative decisions on questions of law he thought might arise during the court-martial.

On appellate review defense counsel argued that the staff judge advocate's furnishing this memorandum to the law officer prejudiced substantial rights of the accused since it — in effect — influenced the law officer in accordance with the views of the staff judge advocate.

In holding that there was no prejudice, the board of review said:

It is important to note that the law officer of a general court-martial under the Uniform Code of Military Justice and the Manual for Courts-Martial, 1951, occupies a status analogous to that of a civilian judge. . . . \(^{17}\)

The board quoted testimony of a member of the drafting committee of the Uniform Code of Military Justice before the Senate subcommittee considering passage of the code: "' . . . [T]his official [the law officer] will now act solely as a judge and not as a member of the court, which becomes much like a civilian jury...' \(^{18}\)

\(^{16}\) "(b) The law officer shall not consult with members of the court, other than on the forms of the findings as provided in article 3\(^{9}\), except in the presence of the accused, trial counsel, and defense counsel, nor shall he vote with the members of the court."

Article 51 says in part:

"(b) The law officer of a general court-martial . . . shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court . . . ."

It also requires the law officer to instruct the court on the elements of the offense or offenses with which the accused is charged, presumption of innocence, reasonable doubt, degrees of guilt and burden of proof.

17. Id. at 662.
18. Ibid.
Soon after, the Court of Military Appeals was afforded an opportunity to take another look at its holding in *U. S. v. Berry*, supra.

In an Army general court-martial in which the accused was convicted of larceny and housebreaking, the law officer — on request of members of the court — explained certain aspects of the difference between a bad conduct and a dishonorable discharge.19 He did this out of the presence of trial and defense counsel and accused. Explaining the difference out of the presence of the defense counsel and accused is in direct contravention of Article 26, Uniform Code of Military Justice.20

However, the law officer appended to the record of the trial a verbatim record of his explanation.

In arguing this case before the Court of Military Appeals, government counsel urged that scrutiny of the verbatim record disclosed that the law officer's explanation did not prejudice any substantial right of the accused.

In holding that this argument could not be sustained in the context of this case, the court said that it was Congress' intent to "... insure, as far as legislatively possible, that the law officer perform in the image of a civilian judge. This policy... must be strictly enforced...."21

The court significantly added that the civilian cases relied on by government counsel did not arise

... at a time or in a system wherein the legislature had recently made an effort to implement basic policies by completely overhauling court procedures and official functions. There is, in the civilian courts, a tradition of centuries standing that judges do not confer privately with juries. In military law, as recently as one year ago, the officers who now serve as law officers were not only allowed but also required as law members to confer privately with the court...22

**OUTSIDE INFLUENCE**

Another interesting law officer-as-judge area is that in which some person (acting in an official capacity) attempts to influence the decision of the law officer.

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This person may be the convening authority of the general court-martial (usually acting through his staff judge advocate) the staff judge advocate himself (acting in that capacity) or the president of the general court-martial (frequently, perhaps usually, an officer senior in rank to the law officer). 23

An illuminating example occurred in a Navy general court-martial. 24 The accused was charged with sodomy and sent for trial before a general court-martial. On the date of trial, defense counsel requested the law officer to grant a continuance even though he conceded he was prepared to proceed on the merits.

He requested the continuance, he asserted, because accused had been previously tried before a judge and jury of a superior court of California for the same offense and acquitted. Accused then had prepared a letter (referring to his acquittal by the California court and Navy policy against second trial by court-martial for the same offense) and had forwarded it to the Secretary of the Navy, prior to the date of this court-martial.

There had been no reply to this letter — indeed, it appeared it had not had time to reach the addressee.

On the basis of these facts the law officer granted a continuance sine die.

By letter, dated two days after the continuance was granted, the Commandant of the 11th Naval District "... directed [the law officer], unless there is reasonable cause for continuance, to resume the trial ... as soon as practicable."

Three days after the date of the letter, the law officer resumed trial. Accused was convicted of sodomy and sentenced to a dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for 1 year. 25

The Court of Appeals — Chief Judge Quinn writing on its behalf — reversed the conviction and ordered a rehearing.

The court first held that granting a continuance rested within the sound discretion of the law officer. Then it un-

23. See e.g., U. S. v. Guest, 3 USCMA 147, 11 CMR 147 (1953) (both staff judge advocate and president); U. S. v. Knudson, 4 USCMA 581, 16 CMR 161 (1954) (convening authority); ACM 10394, Robinson 20 CMR 816 (1960) (convening authority); CM 388689, Godwin 25 CMR 600 (1960) (both staff judge advocate and president).
25. Id. at 163-4.
equivocally stated its view on the convening authority's action:

Having no power to review the law officer's grant of a continuance, the convening authority should not inject himself into the proceedings. However honest may be his belief that he possesses the power, he cannot substitute his judgment for that of the law officer. . . .

The record clearly shows that the law officer yielded to the pressure of the convening authority. . . . In so doing, he abdicated his powers to the convening authority. Manifestly this was error. . . .

When the Court of Military Appeals pointed the way, boards of review in the Air Force and Army took opportunities to follow.

**JUDICIAL STANDARDS AND AUTHORITY**

Lack of space prevents more than one example each of the requirement that a law officer (1) abide by the standards of trial behavior of a civilian judge and (2) have authority during trial analogous to that of a civilian judge.

In a 1956 Army general court-martial the accused was charged with larceny, failure to account for public funds, and absence without leave.

26. Id. at 165-6.
27. It had done so, as well, in U. S. v. Guest, supra, note 23.
28. ACM 10994, Robinson, supra, note 23. In this case defense counsel requested trial counsel to make a charge more specific. The law officer indicated this should be done. Trial counsel procured a recess and contacted the convening authority (actually, undoubtedly, the staff judge advocate to the convening authority — but the reported decision does not say as much) who stated he desired the court to proceed on the charge as it was drawn. After the recess, trial counsel reported this. The law officer denied defense counsel's request — specifically stating that his ruling was based on the communication of the convening authority.
29. CM 398680, Godwin, supra, note 23. In this case the law officer ruled that a statement was inadmissible. The convening authority's staff judge advocate was present as a spectator in the courtroom. Immediately after this ruling he left the room angrily. The law officer granted trial counsel a continuance to obtain other evidence. When the court recessed, the law officer (a captain) was asked by the president of the general court-martial (a colonel) to convey an undisclosed message to the staff judge advocate (a colonel). When the law officer reported to the staff judge advocate, the latter asked questions concerning testimony leading up to the law officer's ruling and possibly indicated by implication an opinion concerning it. The law officer also discussed his ruling with the chief of the military justice section of this staff judge advocate's office. A week later another out-of-court hearing was held on the question and the law officer reversed his previous ruling on admissibility of the statement. The accused was convicted. On appellate review the board of review reversed accused's conviction and ordered the charges dismissed.
30. CM 393003, Neal, 23 CMR 463 (1956).
The trial counsel had difficulty in introducing various documents in evidence. The law officer "took over" and actively assisted in this. He also took over examination of a witness, over defense objection, and developed considerable evidence the trial counsel did not bring out. With still another witness the law officer laid a foundation for introduction of documentary evidence. He also questioned a fourth witness at length on matters not previously in evidence.

In overturning conviction of the accused and ordering a rehearing, the Army board of review said:

The law officer is a judge and his active participation in the trial of the case in another capacity constitutes error (citing cases)....

Congress, in enacting the Uniform Code of Military Justice, clearly intended that military personnel charged with serious offenses would be tried by a 'judge' and 'jury'.... 31

An interesting example of authority accorded a law officer, long accorded a civilian judge (and regarded as fundamental), is illustrated in an Army general court-martial.32

Borner and others were convicted of felony murder and rape while stationed in Korea. Defense counsel requested that the court members be permitted to view the alleged scene of the offenses. The law officer denied this motion.

Both the Army board of review and the Court of Military Appeals held that granting a view of the scene of an alleged offense lies within the "sound discretion of the law officer."33

However, there is a caveat here as the law is presently constituted: under certain circumstances the law officer's authority has been held to be subject to the ultimate authority of the convening authority.

For example, granting or denying relief similar to that provided by a change of venue in a civilian court has been held to be "... within the discretion of the law officer in the first instance and thereafter within the discretion of the convening authority...."34

31. Id. at 465-6.
33. 8 CMR at 493; 12 CMR at 66.
34. ACM 7761, Schreiber, supra, note 14.
There is one additional area with regard to the law officer in which the Court of Military Appeals has found it necessary to speak forthrightly.

It would be almost unthinkable for the situation to occur in a civilian criminal trial. Yet, because a general court-martial is composed of officers vitally concerned daily (in most instances) with a disciplinary system and because in years past these officers have been both judge and jury, chaos occasionally results.

Infrequently, higher ranking court members attempt to transform themselves into lawyers. They become partisan advocates and endlessly ask questions of witnesses. In the process they almost invariably commit prejudicial errors and extend a court-martial to unusual lengths.

Because the general court-martial is composed of officers vitally concerned with a disciplinary system — and because in past years other officers have traditionally been both judge and jury — and because some members of the general court-martial are frequently older and higher ranking than the law officer — and because sometimes the law officer is not only relatively young and lower ranking but also not particularly able or experienced — because of all these factors, the law officer seems either unable or unwilling to control the activities and questions of the court members.

The problem is amply illustrated by an Air Force general court-martial.\textsuperscript{35}

In this case, one member of the court-martial examined or cross-examined every witness. He elicited testimony "favorable to the prosecution and cast doubt on the credibility of witnesses who sought to aid the accused."\textsuperscript{36} This resulted in other members of the court-martial doing likewise.

The situation was characterized by one judge of the Court of Military Appeals:

... The pattern of the trial literally followed the rule of mass participation. ... I doubt that I've ever reviewed a record in which court members sought so diligently


\textsuperscript{36} Id. at 125.
to assist counsel in the presentation of their case. . . .

One can readily appreciate that a trial gets out of control when some members of a court consider that they are pseudo-lawyers and then are permitted to practice their art from the fact-finder's bench. . . . 37

This judge — Judge Latimer — felt it necessary to write a separate concurring opinion (the majority opinion reversed the case on account of this activity) to make clear to law officers that they had a responsibility to control this sort of behavior; and to suggest specific ways of doing it. 38

The Court of Military Appeals left no doubt in the minds of law officers and potential general court-martial members of all armed forces that the law officer must function as a judge regardless of relative rank.

**CONCLUSION**

While it is apparent that the military "judge" has progressed rather rapidly along the road to becoming a judge in the civilian juridical sense, it is also apparent that it will take further decisions by armed forces' boards of review and the Court of Military Appeals before a really adequate position is reached.

Part of the difficulty, as I have said above, appears to lie in the fact that some armed forces' judge advocates who are appointed law officers lack age, maturity, experience and perhaps — sad to relate — ability and judicial temperament. Thus, it is difficult to force a judge-like pattern on older, more mature, higher-ranking court members, some of whom may remember when they were both judge and jury — or at least have heard tales of it.

Patience and persistence — an excellent prescription for many difficult situations — will probably be the handmaidens of an ultimately successful solution.

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37. Ibid.
38. Id. at 126.