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Albert R. Mugel
University at Buffalo School of Law

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MILITARY JUSTICE, COMMAND, AND
THE FIELD SOLDIER

ALBERT R. MUGEL*

It was recognized from the beginning by the committee that a
system of military justice which was only an instrumentality of
the commander was as abhorrent as a system administered en-
tirely by a civilian criminal court was impractical.

We were convinced that a Code of Military Justice cannot ig-
nore the military circumstances under which it must operate but
were equally determined that it must be designated [sic] to ad-
minister justice.

These were the words of Professor Edmund M. Morgan,
Chairman of a Committee appointed by the late Secretary of
Defense James Forrestal to draft a code of military justice ap-
plicable to all of our armed services.¹ The proposal of this com-
mittee became the basis of the Uniform Code of Military Justice
as finally approved by Congress.² Now that the Code has been
in operation for nearly two years, it is opportune to inquire as
to the sufficiency of the design in the light of its administration.³

In former years when our military establishment comprised
less than two hundred thousand men who had voluntarily sub-
jected themselves to military control by enlistment, and even in
the wartime universal call to service, with the recognition of the
inherent inequity required by the exigency of battle, the public
concern for the workings of the military courts was at most
sporadic. But today with the growing realization that a long
range defense program will require the subjection of most young
men to a period of military service, even in peacetime, the public
concern can be expected to be acute. It is even more important
than this. Unless the American public can be satisfied that a basic-
ally sound system of military justice is in the making, it very
well may be impossible to have a consideration on the merits of
such plans as Universal Military Training, or alternatives, as
providing an adequate system of defense. The actions of the

* Associate Professor of Law, University of Buffalo, School of Law. Professor
Mugel served as an Army line officer in combat both during World War II and the
Korean conflict.
1. Hearings before a Subcommittee of the Committee on Armed Services on
pars. 551-736. Hereinafter it will be cited as U. C. M. J.

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military courts transcend the military experience. Possible sentences include the deprivation of life, confinement beyond the term of enlistment or other required service, and discharges that may affect citizenship rights and disqualify a man from civilian employment. America will not easily allow its youth to be funneled through this jeopardy without an observable assurance of justice.

Beyond this, military command should be the first to appreciate that the maintenance of military morale in peace time is most difficult, and that an effective ready force requires respect for the service, which in turn cannot exist without the confidence that fair treatment is accorded to the most obscure soldier. The willing acceptance of military service by the youth of this country as a responsibility to our heritage of freedom and justice, which is so vital to the strength of our defense, can ill be achieved unless the feeling of this heritage permeates the period of service to the extent recognizably practical.

Military justice in this country has for many years presented a strange anomaly. On the one hand the system seems to be remarkably solicitous of the accused person, providing a procedure that on its surface grants him protection against unjust accusation, acknowledges the principles of fair trial in the American tradition, and allows a number of opportunities of review of convictions that exceeds the most liberal of our civilian court systems. On the other hand it is susceptible to an extreme type of criticism, the documentation of which on its surface is shocking to the sensibilities of the most insensitive person.

A person unfamiliar with the problems of the military commander finds the conduct of the military courts system an easy target for vehement censure. But the difficulty is that the same person probably would be willing to go farther and condemn the entire military establishment as being unfair. The practice of saluting is readily ridiculed in the living room, the very idea of rank and its privileges is abhorrent to the principles upon which

4. The self-satisfaction of the military is characterized by the statement of a member of the Army Judge Advocate General's Corps:

Let it be said at the outset that probably no one accused of a crime in any state or federal jurisdiction is given more opportunity to assert his innocence or more privileges of appellate review than one convicted by court-martial. Landman, One Year of the Uniform Code of Military Justice: A Report of Progress, 4 STAN. L. REV. 491, 492.

our nation was founded, and such things as close order drill may well be viewed as outward marks of regimentation. But saluting is more than "a form of military greeting," rank is more than privilege, and drill is more than a symbol. The problems of the military commander are unique and his responsibilities have no civilian counterpart. Military tradition has developed tools to meet these problems and responsibilities, and no alternatives are offered by the critics of the military. The commander jealously guards his concept of military courts to protect the entire military system which he feels would be equally vulnerable to the tenor of the attacks.

The standards of civilian criminal procedure cannot be applied absolutely to military courts. In a case involving misbehavior before the enemy, a civilian criminal lawyer would consider it absolutely essential to a fair trial to have a change of venue from the combat zone. But the trial must be held on the spot, as the military operation cannot be halted to permit witnesses to testify, and the trial cannot be delayed, for death, wounds and rotation make witnesses quickly unavailable. More delicate is the suggestion that injustice may be calculated as inherent in the situation. A case of misbehavior before the enemy may well involve a psychosis, but such a diagnosis on the battlefield may cause an epidemic. The fact is that even cowardice, as reprehensible as it is, does not involve criminality in the civilian sense, and an attempt to transpose civilian standards of culpability to it is impossible.

But these are combat situations, and it may well be argued that the military ought not be allowed to hide behind the exigencies of battle to avoid rebuke for failure to meet an adequate standard of procedure in the conduct of courts-martial within the United States or with troops in garrison or on occupation duty.

6. In the most publicized court-martial of the Korean conflict, that of the Negro Lieutenant Leon Gilbert, (CM 343372, 9 B. R. & J. C. 183), the trial was held within 500 yards of the front line, and during recesses the members of the court joined in fighting off the enemy. The Army Board of Review and Judicial Council found no reversible error in this fact.

7. There is no provision for a motion for change of venue of courts-martial, nor is it recognized. (Johns, CM 317064, 66 B. R. 169). A challenge to the array is also not possible. The challenge of the panel for cause could be accomplished only by challenging each member individually, and each challenge would be voted on by the other members. (Stuart, CGCMS 19348, (B. R.) 4 C. M. R. 476). Convening authorities' practice in the combat zone of appointing members of the court entirely from the regiment of the accused, while having some practical justification, should be discouraged. The Court of Military Appeals may find ultimately that in such a situation involving probable hostility there is "general prejudice" as discussed later in this article. It is assumed that the Court of Military Appeals would weigh the indication of probable hostility against the practical considerations of the convening authority. Defense counsel, feeling that there is a peculiar bias of the court-martial, should cautiously build his record by individual challenges, and by formal indication of his objection to the panel.
It is pointed out that "before the enemy" cases make up a relatively small part of the total tried by courts-martial. There is a great deal of merit to this argument, but it must be observed that there are several offenses in garrison that do not involve criminality in the civilian sense—such as disrespect of superior officers or non-commissioned officers, and disobedience. These offenses too must be punished to protect the system as a whole, and as there is no civilian equivalent, there can be no absolute correlation of military and civilian justice. But beyond this, the military commander's career is not neatly divided between garrison duty and combat with the enemy. His work in garrison is to prepare troops to meet the enemy; in fact, the only justification for his military existence is the preparation for and engagement in battle. The military commander cannot be expected to develop a double standard for his sense of justice. It would be sufficient if he would develop a single satisfactory one.

As much as we may understand and appreciate the position of command, the fact remains that public confidence in the system is essential, and the members of our armed forces must have respect for and faith in their military courts. Unfortunately, it must be reported that the latter presently is not the fact. The question then is as to whether there now are forces in action that can reasonably be expected to restore the public confidence in military justice, and prove the integrity of the system to present and prospective military personnel.

HISTORY OF REFORM

The principal focus of the complaints against the system of military justice is on what has been popularly called "command control." It is not the feeling that great numbers of innocent persons are being tried and convicted by courts-martial, but that the system as such makes "justice" the instrumentality of the commander without sufficient safeguards against arbitrary and tyrannical flouting of individual rights which we have long considered available to even the most obviously guilty. 8

Command control at its source is the system by which the commander appoints an investigating officer to examine into the truth of the charges that have been preferred, 9 then reviews the

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8. In 1946 the Report of the War Department Committee on Military Justice stated a finding that "although the innocent were not punished, there was such a disparity and severity in the impact of the system on the guilty as to bring many military courts into disrepute both among the law-breaking element and the law-abiding element, and a serious impairment of the morale of the troops ensued where such a situation existed." Rep. of W. D. Adv. Comm. on Mil. Jus. 6 (1946).

findings of the investigating officer, and refers the charges to a court-martial, the members of which, including the law officer, the prosecuting counsel, and the defense counsel, have been appointed by him from his command.\textsuperscript{10} The commander then reviews the findings of the court-martial as to correctness in law and fact,\textsuperscript{11} and exercises clemency as to the sentence imposed.\textsuperscript{12}

When it is understood that all these persons are under the commander's disciplinary jurisdiction, it can easily be seen that the system permits the subjugation of the court to the will of the commander. When it is recognized that the court-martial was originally conceived as an instrument of discipline,\textsuperscript{13} it is not surprising that many commanders are disposed to mold the system to their own desires, and to treat the modern procedure designed to protect the rights of the accused as the unfortunate, though possibly necessary, evils of compromising with civilian meddlers. The result is often a mockery of justice.\textsuperscript{14}

\textsuperscript{10}. U. C. M. J. Arts. 22, 26, 27. The accused is entitled to defense counsel of his own choosing (U. C. M. J. Art. 38), but in many situations this is more theoretical than real. In an overseas command the accused practically could select only from military personnel, and the military person selected could serve only if found reasonably available, usually by the commander appointing the court. The question of availability of military personnel for court duty has been held to be within the discretion of the commander and not subject to review. \textit{Hiatt v. Brown}, 339 U. S. 103 (1950). The new Court of Military Appeals has held that there need be no showing by the government of "unavailability", but that the accused must affirmatively show availability. \textit{U. S. v. Davis}, ___ U. S. C. M. A. ___, 2 C. M. R. 8 (1952). It is not in the nature of the military establishment for the accused to be able to show "availability" of the person he selects to defend him. See also, \textit{Dixon (B. R.) 1 C. M. R. (AF) 594}. In \textit{Hatteberg, CM 231963}, 18 B. R. 349 (1943), two officers of the Judge Advocate General's Department sat as regular members of a court-martial, but an officer not a member of the Judge Advocate General's Department sat as law member. The Board of Review held that the failure to appoint a member of the Judge Advocate General's Department as law member was equivalent to a finding that none was available, despite the fact that two sat on the very court as regular members, that "availability" was within the sole discretion of the appointing authority, and that the court was properly constituted.

\textsuperscript{11}. The commander is required to refer the record of trial to his staff judge advocate for an opinion, U. C. M. J. Art. 60, but he is not compelled to follow that advice in his action. MANUAl FOR COURTS-MARTIAL, (hereinafter cited MCM) 1951, par. 85c.

\textsuperscript{12}. U. C. M. J. Arts. 64, 71. The tacit policy of command as to sentencing and clemency will be discussed later in this paper.

\textsuperscript{13}. See \textit{1 WINTHROP, MILITARY LAW AND PRECEDENTS}, 53 (1886): 
\textquote{"(T)hey [courts-martial] are in fact, simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."} Winthrop was used as the text on military law in the education of most of the officers presently exercising general court-martial jurisdiction.

\textsuperscript{14}. The Court of Claims in passing upon a claim for back pay of a second lieutenant who, acting as defense counsel for an enlisted man, demonstrated a mistaken identification of the accused, and as a result was court-martialed himself and dismissed from the service, stated:

\begin{quote}
A more flagrant case of military despotism would be hard to imagine. It was the verdict of a supposedly impartial judicial tribunal; but it was evidently rendered in spite against a junior officer who had dared to demonstrate the fallibility of the judgment of his superior officers on the court
\end{quote}
The suggested reforms of the system of military justice have moved from two approaches. The first has been the suggestion that the rights of the accused should have safeguards outside the military. The ultimate extremists would turn over jurisdiction of military offenses to civilian courts. The obvious impracticality of this prevents it from being taken seriously. But somewhat more reasonable has been the position that our federal courts should have jurisdiction to review court-martial convictions at least so far as to insure the extension of due process in the constitutional sense. Still more moderate has been the proposal that has been adopted: that of setting up an ultimate court of appellate review comprised of civilian judges. The military had set up as its first line of defense the argument that the requirement that the secretaries of departments of the service be civilians was sufficient civilian control.

The second approach to reform of the system of military justice has been the suggestion that the safeguard against command abuse be provided within the military by separating the court function from command. This would be accomplished by the complete separation of the Judge Advocate General’s Department from normal channels of command, and turning over to it the responsibility for military justice. The proposal can be best stated in the words of retired Marine Corps General James Snedeker:

> The disease could be torn out at its roots by the establishment within the armed services of a legally trained group which would be officially independent of troop commanders. One of the tenets upon which our country was founded was that of an independent judiciary. That basic concept can be moulded to fit the armed services of our country. The commander could arrest an offender, investigate the offense, order the offender tried, and control the prosecution. The administration of military justice should be in the hands of a legally trained corps concerning the duties of which the troop commander makes no reports, gives no

who had, indeed, made them look ridiculous. It was a case of almost complete denial of plaintiff’s constitutional rights. It brings great discredit upon the administration of military justice.” Shapiro v. U. S., 69 F. Supp. 205, 207 (1947).

In Betts v. Hunter, 75 F. Supp. 825, 826 (1948), the United States District Court of Kansas, in passing upon habeas corpus proceedings involving a man convicted by court-martial, stated:

> He could not have received due process of law in a trial in a court before men whose judgments did not belong to them, who had not the will nor the power to pass freely upon the guilt or innocence of this petitioner’s offense, the offense for which he was charged. It cannot stand the test of fundamental justice. It may have been prompted by the exigencies of war, but it cannot stand in the light of cold reason and justice as we love it and for which this petitioner was fighting when he was arrested.
comments, and exercises no control whatever. The members of the court-martial could be appointed by the area representative of the Judge Advocate General from a panel of available officers and men in the area. The defense counsel could be chosen from the members of the legal corps. The work of the members of the court-martial and of the defense counsel should never be allowed to come to the attention of the troop commander. Good justice never has had a bad effect on discipline. The two do not even overlap. Discipline delivers the accused for trial; justice then takes over for the trial and possible punishment.  

A very much more moderate proposal has been that, while the court function remain with command, the Judge Advocate General’s Department members be separated from command down to and including the rendering of efficiency and effectiveness reports. The even more timid proposal is the one that has been adopted for the Army; that is, that the court function remain with command, and command continue to render efficiency and effectiveness reports on Judge Advocate personnel, but that members of the Judge Advocate General’s Department perform their duties under the direction of the Judge Advocate General, that its members be assigned by the Judge Advocate General, and that its members be authorized to communicate within the Judge Advocate General’s Department without going through command channels.  

The Army also has set up a separate promotion list for Judge Advocate General’s Department officers. In addition to this it has been provided that the commander shall not censure, reprimand, or admonish those performing judicial functions, and that he not attempt to coerce or influence judicial action, and that it shall be a court-martial offense to violate these provisions. Anyone who has confidence in this latter provision as preventing the influencing of courts greatly underestimates the resourcefulness of command. Subtle suggestions of courses of conduct can easily be accomplished by assignment prerogatives, by efficiency reports, and by the atmosphere of military life in general. Foolish, as well as brave, would be the junior officer who would bring charges against his commander on such a tenuous line.

The separation of the court function from command has been proposed ever since the end of World War I when it was specifically submitted as a part of the Chamberlain Bill. The Bill died in committee. Public apathy followed until a furore arose as veterans returned from World War II. Several committees to

17. This also was enacted in 1948, but is now contained in the Uniform Code of Military Justice, Arts. 37, 98.
investigate, study, and report were appointed, including the Vanderbilt Committee for the Army and the Keefe Board for the Navy. A clemency board was also established by the War Department to review all sentences of army general courts-martial where the accused was still imprisoned. The Vanderbilt Committee recommended the divorcing of military justice from command control, by the creation of a separate Judge Advocate General’s Corps having an organization similar to the Medical Corps within the Army. The War Department opposed this, and drafted its own reform bill without incorporating such provisions. This bill was suddenly attached as an amendment to the National Defense Act of 1948 on the floor of the Senate, and was passed on the assurances of Senator Kem that it contained the reform provisions recommended by the American Bar Association and the Vanderbilt Committee. It has become known as the Elston Act, and contained the provisions mentioned in the preceding paragraph. The Navy counterpart of this bill was never brought out of committee. In view of unification legislation, the Secretary of Defense then appointed a committee primarily for the purpose of drafting a Code of military justice that would be applicable uniformly to all the services. With some amendments this committee’s proposals became the Act of May 5, 1950, entitled the Uniform Code of Military Justice.

The new Code represents a compromise of the demands for reform, in view of the vehement objections of the military services to the separation of the courts system from command function. It should be understood that the principal effectiveness of the new Code is in providing a system of military justice applicable uniformly to all of the armed services. To the greatest extent it patterned procedure on the Army system, including many of the provisions of the Elston Act. But it contained two extremely important innovations. The first, and most important, was the provision for a court of appellate review made up of three civilian judges, having all the characteristics of an independent judicial body, and known as the Court of Military Appeals. The second, was the separation of the law officer of a general court-martial

20. 94 CONG. REC. 7754 (June 9, 1948).
21. Supra n. 16.
22. The Committee was composed of Professor Edmund M. Morgan, Chairman, Asst. Secretary of the Army Gordon Gray, Under Secretary of the Navy John Kenney, and Asst. Secretary of the Air Force Eugene Zuckert. The personnel selected for the Committee suggests that its main purpose was unification, but it was instructed to provide full protection of the rights of individuals without unduly interfering with military discipline and functions.
23. Supra n. 2.
from court membership, and his establishment in a position equivalent to a judge.\textsuperscript{25} Previously the law officer was designated as "law member" and retired with the regular court members to vote on the verdict and the sentence. His instructions were not given in the presence of the accused nor were they a matter of record. This change is important as it brings into open court the instructions on the law by the law officer so as to provide some check on the propriety of the considerations of the court. The law officer is required to instruct the court on the elements of the offense, the presumption of innocence, and the burden of proof.\textsuperscript{26} He rules upon interlocutory questions, other than challenges, and his rulings are final, except on motions to dismiss or questions of the accused's sanity.\textsuperscript{27} The Elston Act had departed from the prior rule of the Articles of War whereby the law member's ruling on any interlocutory question, other than admissibility of evidence in a limited sense, could be upset by a vote of the members of the court.\textsuperscript{28} The law officer is required to be a lawyer, the previous "if available" limitation of the Articles of War having been removed by the Elston Act.\textsuperscript{29} But the separation of the law officer from court membership and the placing of him in the position equivalent to a judge is of even greater importance in the effect it should have of increasing the prestige of law and justice in a setting that has been overpowered by the atmosphere of military discipline.\textsuperscript{30}

It is unfortunate that the creation of the Court of Military Appeals by the Uniform Code of Military Justice has been widely viewed as intended to be merely an answer to the problem of command control.\textsuperscript{31} It may well be that, but it is a great deal more. It is only in the light of the broader significance of the new court that the importance of its functions can be evaluated, and the effectiveness of its work appraised. In the larger sense the Court of Military Appeals may fill a gap in our overall protection of the rights of our citizens due to the peculiar position of the serviceman arising from the uncertainty of the extension of constitutional rights to him, and the difficulty in finding a forum outside the

\begin{itemize}
\item \textsuperscript{25} U.C.M.J. Art. 26.
\item \textsuperscript{26} U.C.M.J. Art. 51 (c).
\item \textsuperscript{27} U.C.M.J. Art. 51 (b). As to motions for a finding of not guilty and questions of the accused's sanity, the initial ruling of the law officer may be objected to by any member of the court, in which event the question will be decided by vote of the court in closed session.
\item \textsuperscript{28} A.W. Art. 31, as amended by Act of June 24, 1948, \textit{supra} n. 16.
\item \textsuperscript{29} A.W. Art. 8, as amended by Act of June 24, 1948, \textit{supra} n. 16. As to the possibility of subverting the requirement by utilizing the "if available" proviso of the A.W. Art. 8, see Hatteburg, \textit{supra} n. 10.
\item \textsuperscript{30} The extent to which this has been accepted in spirit by the military is discussed later in this paper.
\item \textsuperscript{31} Cf. \textit{INDEX AND LEGISLATION REPORT, UNIFORM CODE OF MILITARY JUSTICE} (1950).  
\end{itemize}
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military to enforce them. While the need for this protection may be more acute due to the possibility of command interference with the military courts, it is extremely unfair to ascribe the total need, or even a major part of it, to command influence. Questions of constitutional rights and the extension of procedural due process are frequent and difficult in civil tribunals, and there is no reason why military courts should be immune from the equivalent questions even in the absence of the slightest command control. In many instances where constitutional protections have been held not applicable to personnel before military tribunals, or where applicability is uncertain, Congress has indicated clearly the intention that the equivalent protection be provided. Understanding of the degree to which the ultimate responsibility for the extension of this protection rests with the Court of Military Appeals, requires a recognition of the enormity of the preexisting gap.

The Constitution expressly deprives members of the armed forces of only one of the safeguards generally accorded all persons; that is the requirement of presentment or indictment of a grand jury before being held to answer for a capital or otherwise infamous crime. However, Article I of the Constitution grants to Congress the power to make rules for the government and regulation of the land and naval forces, and Article II provides that the President shall be the Commander-in-Chief of the Army and Navy of the United States. At an early date the Supreme Court held that courts-martial are established under these provisions, rather than under Article III providing for the judiciary. Thus, both the matter of the availability of the procedural safeguards of the Constitution to personnel tried by courts-martial, and judicial reviewability of courts-martial proceedings were thrown into question.

It is relatively clear that certain of the guarantees of the Constitution do not apply to persons tried before military courts. The Sixth Amendment right to trial by jury is unavailable on the theory that military tribunals are created under the authority of the executive branch of the government to carry out legislative action in providing the rules for government of the armed forces, or in waging war, or providing for the common defense, and that the Sixth Amendment guaranteed the right to jury trial in those situations where it was extended by common law, but not in those

32. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . ." U. S. Const. Amend. V.
34. Art. II §2.
situations where by custom no jury trial was provided. In a sense the panel of members of a court-martial resemble a jury, and the provision of the Uniform Code of Military Justice in separating the law officer from the panel increases the likeness, but when thought is given to the manner of appointment of the members the resemblance ends. The direction of many reform movements indicates the envisionment of an approach to the civilian concept of a jury. At the conclusion of World War I, it was suggested that a proportion of the members of the court be of the same rank as the accused. This has been adopted to an extent by the amendment made in the Elston Act and carried over to the Uniform Code of Military Justice to the effect that upon written request of the accused at least one third of the court will be composed of enlisted men appointed by the convening authority. The suggestion that members of courts-martial be appointed by a representative of the Judge Advocate General from a panel of officers and men available in the area moves closer to the jury concept. However, from the nature of the military establishment it is apparent that it is impossible to devise a system whereby the accused will be tried before a jury of his peers. The realistic recognition of this fact emphasises the importance of appellate review.

Mr. Chief Justice Stone in Ex parte Quirin used broad language to indicate that the exception of "cases arising in the land and naval forces" refers to all the protections offered by the Fifth Amendment, and, by implication, extends to deprive a person brought to trial before a military tribunal of the rights guaranteed under the Sixth Amendment. This was picked up by Judge Frank of the Court of Appeals for the Second Circuit, who states: "The Fifth and Sixth Amendments are, of course, inapplicable to a court-martial."

Many courts, including the United States Supreme Court, at times have assumed otherwise. The double jeopardy provision of the Fifth Amendment was apparently considered applicable to

37. A.W. Art. 4, U.C.M.J. Art. 25 (c). This has been one of the most abortive attempts at reform. The custom of command, when such a request is made, is to appoint senior non-commissioned officers who have a reputation as severe disciplinarians. In any event the enlisted man on a court-martial is even more susceptible than an officer to influence of high ranking superiors. The inadvisability of making such a request now is well known to the soldier, and is usually confirmed by the advice of defense counsel, so that very seldom do enlisted men serve on courts-martial. This attempted reform has done considerable harm. The soldier bitterly resents the per-vision of a provision intended to help him.
38. Supra n. 15.
39. Supra n. 36.
40. Id. at 40.
41. Innes v. Crystal, 131 F. 2d 576, 577 n. 2 (2d Cir. 1943).
courts-martial in *Wade v. Hunter*, although the Supreme Court held that it was not violated in that case. The due process provision of the Fifth Amendment has been regarded by several courts as protecting persons before military courts. The Court of Appeals for the Third Circuit has stated: "The guarantee of the fifth amendment that ‘no person shall . . . be deprived of life, liberty, or property without due process of law,’ makes no exceptions in the case of persons who are in the armed forces. The fact that the framers of the amendment did specifically except such persons from the guarantee to the right to a presentment or an indictment of a grand jury which is contained in an earlier part of the amendment makes it even clearer that the persons in the armed forces were intended to have the benefit of the due process clause." But the Court went on to indicate that the due process required was the conduct of the "military procedure" in a "fundamentally fair way."

The primary reason for the uncertainty of the extension of the procedural guarantees of the Constitution to courts-martial has been the preliminary difficulty in finding a forum outside the military to review the proceedings. The Uniform Code of Military Justice specifically provides, as the Articles of War previously had, that the court-martial proceedings and review provided by the Code shall be final and conclusive and shall be binding upon all departments, courts, agencies and officers of the United States. The Supreme Court had previously confirmed the frequent holding that civilian courts could not review the correctness of a finding of guilt by a court-martial. The only possible bases for review by civilian courts were that the court-martial was not properly convened, or that the court-martial lacked jurisdiction over the person, or lacked jurisdiction over the offense, or that the sentence was beyond the jurisdiction of the court-martial to impose. The usual, and practically only, manner of raising such questions in civilian courts is by writ of habeas corpus, although

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42. 336 U. S. 684 (1948).
43. Sanford v. Robbins, 115 F. 2d 435 (5th Cir. 1940), cert. denied, 312 U. S. 697; Innes v. Hiatt, 141 F. 2d 664 (3d Cir. 1944); Shita v. King, 133 F. 2d 283 (8th Cir. 1943); Hicks v. Hiatt, 64 F. Supp. 238 (M. D. Pa. 1946); Shapiro v. U. S. supra n. 14; Betts v. Hunter, supra n. 14.
44. Innes v. Hiatt, supra n. 43 at 666.
45. Ibid.
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a suit in the Court of Claims for back pay is possible. The Supreme Court, however, has emphasized that "by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction."4

A possibility of review of court-martial proceedings insofar as the question of due process is concerned arose with the announcement by the Supreme Court in 1915 that jurisdiction, even though it had existed, could be lost through the denial of constitutional rights in the course of the proceedings. It was on this theory that the questions of the extension of constitutional protections to persons tried by court-martial were decided by civilian courts. However, in 1950 the case of Hiatt v. Brown came before the Supreme Court. The Court of Appeals for the Fifth Circuit had affirmed the District Court in sustaining a writ of habeas corpus, and had stated that the record was "replete with highly prejudicial errors which have manifestly operated to deprive the petitioner of due process of law." The Supreme Court reversed, stating in part:

The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived the respondent of due process. We think the court was in error in extending its review, for purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. Cf. Humphrey v. Smith, 336 U. S. 695 (1949). It is well stated that "by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test, is jurisdiction." In re Grimley, 137 U. S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision. In re Yamashita, 327 U. S. 1, 8-9 (1946); Swaim v. United States, supra, 165 U. S. at 562.

54. In re Grimley, 137 U. S. 147, 150 (1890).
55. Frank v. Mangum, 237 U. S. 309 (1915); see also, Ex parte Hawk, 321 U. S. 114 (1944).
56. See cases n. 43.
58. 175 F. 2d 273 (5th Cir. 1949).
59. Supra n. 57 at 110, 111.
While this holding may merely mean that the specified errors of the court-martial are not such as to deprive the accused of due process, it may portend that deprivation of due process is not a jurisdictional question for review of courts-martial proceedings by writ of habeas corpus. The latter possibility may not be unfortunate, as habeas corpus is hardly an adequate or appropriate method of assuring that courts-martial provide basic constitutional guarantees. In any event it was opportune that the enactment of the Uniform Code of Military Justice creating the Court of Military Appeals coincided with the Supreme Court action in Hiatt v. Brown. The new Court enters an arena in which there is great confusion as to whether constitutional guarantees extend to servicemen, and grave doubt as to whether there is an adequate forum outside the military available to make certain that what rights exist are, in fact, extended to the members of our armed forces. But this much is clear; Congress by its enactments has indicated its intention that in most cases, and in some form, our military personnel be accorded the same, or equivalent, protection to that accorded the civilian populace.60 The Court of Military Appeals is the appropriate, and perhaps only, vehicle by which compliance can be assured.

COURT OF MILITARY APPEALS

The significance of the new Court of Military Appeals may be placed in three areas:

(1) As an ultimate court of appellate review. As such, the Court enjoys the unique position of being able to start from scratch in developing a modern and model series of principles of criminal law and evidence. It is unfettered by legal fictions, narrow precedents, or out-dated formalism. On the other hand it has the wealth of the experience of state, federal, and foreign courts from which it can pick and choose in evolving an enlightened, progressive system of criminal and evidentiary law.61 In this aspect the opportunities of the Court are great.

(2) As filling the void in providing the equivalent of constitutional guarantees to members of our armed services. The mandate of the Congress is clear, but the task of fitting principles of justice into the exigencies of military operations is arduous. In this aspect the responsibilities of the Court are heavy.

60. For a discussion of these rights as affected by the Uniform Code of Military Justice see, Snedeker, The Uniform Code of Military Justice, 38 Geo. L. R. 521, 535-549, 559-564 (1950); Comment, 28 Tex. L. R. 651 (1951).

61. It is heartening to note that members of the Court enthusiastically recognize this fact. See Foreword by Judge Brosman, Symposium on Military Justice, 6 Vand. L. Rev., 166 (1953).
(3) As a supervisory body required to survey the operation of the system of military justice and to make recommendations. It is apparent that a major concern of the Court in this capacity must be the elimination of command influence over courts-martial, and the securing of acceptance by all echelons of command of the spirit as well as the letter of the Uniform Code of Military Justice. In this aspect the problems of the Court are many.

The present Court of Military Appeals is composed of Chief Judge Robert E. Quinn, former Governor of Rhode Island, Judge George W. Latimer, former Justice of the Supreme Court of Utah, and Judge Paul W. Brosman, former Dean of Tulane University Law School, all of whom were appointed from civilian life, as required, by the President with the confirmation of the Senate. Chief Judge Quinn served with the Navy as a legal officer during World War II, while Judge Latimer was an Army line officer, and Judge Brosman was a Judge Advocate with the Air Force. The branch, and type of duty, of the Judges in their previous military experience, if kept in mind while reading their opinions, is quite illuminating.

A mandatory review by the Court of Military Appeals is provided as to affirmed convictions of general or flag officers or where the sentence is death, or cases forwarded by a Judge Advocate General. The accused, in any other case, may secure a review only upon petition and on good cause shown. All reviews by the Court of Military Appeals are conditioned upon previous review by a board of review constituted by a Judge Advocate General.

**SCOPE OF REVIEW**

While the military services were forced back to their secondary line of resistance to civilian encroachment by the provision for the Court of Military Appeals, they were able to halt the onslaught initially at the outpost position of restriction of review to matters of law. However, an outpost is always vulnerable, and while the enemy may not be able to occupy it, the position

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62. U.C.M.J. Art. 69 (g).
63. The Court has rendered its first annual report for the period from May 31, 1951, to May 31, 1952. It indicated that not sufficient time had elapsed to make overall recommendations. The only major recommendation made was that the power to adjudge punitive (bad conduct) discharges no longer be extended to special courts-martial. ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, 1952.
64. U.C.M.J. Art. 67 (a).
65. Id. Art. 67 (b) (1), (2).
66. Id. Art. 67 (b) (3).
67. Id. Art. 67 (d).
may become untenable. The history of restriction of review to the law is no exception.

The very first written opinion of the Court of Military Appeals involved the question of the sufficiency of the evidence to support the conviction. Probably no court of which so much could be expected, and indeed, by which so much has been accomplished in its early operations, has had as convulsive an introduction as did the Court of Military Appeals in United States v. McCrary. This was not so much on the question of the test to be applied in determining the sufficiency of evidence as a matter of law, as there are several tests that might have been reasonably adopted by the Court, but rather as to whether the Court would require any evidence at all as to an element of an offense.

McCrary was charged with desertion, an offense involving the intent permanently to remain away from his organization. The only evidence introduced on the trial was an extract copy of the unit Morning Report, which remarked that the accused's status changed from "duty" to "absent without leave" from his organization on October 23, 1950. It was stipulated that the accused surrendered to military authorities in Alabama on December 22, 1950. This was typical of the "one-minute" court-martial for AWOL or desertion. Where does proof of intent to remain away permanently appear? Judge Latimer, writing the opinion, stated that the court-martial could have taken judicial notice of the Korean conflict; noted from the Morning Report that the accused was a member of an overseas replacement squadron, located at Camp Stoneman, California, which could be judicially noted to be near San Francisco, which in turn could be judicially noted to be a port of embarkation for overseas duty and finally that it could be inferred that the accused knew these facts. From this, and the fact that accused was absent 60 days and surrendered 2000 miles distant from his organization, the court-martial could have found the intent permanently to remain away.

There was no indication in the record of the case that the court-martial had taken judicial notice of these facts, nor could it have been determined that the accused was not a member of the permanent compliment of the replacement squadron. The inference drawn from imminent overseas combat duty may be questionable as showing intent to remain permanently away. Most

69. U.C.M.J. Art. 85. McCrary was charged under A.W. 58, as the offense occurred before the new Code became effective.
70. Morning Report entries are admissible as an official record made in regular course of business. MCM, 1951, par. 144 (b).
disturbing, however, was the considerable emphasis placed by Judge Latimer in his opinion on the accused's failure to explain his absence as permitting the inferences to be drawn. And of great importance was the announcement by Judge Latimer to the effect that he intended to adhere strictly to the restriction of the Court's power of review to questions of law, and that if there is any substantial evidence to support a finding of guilt, in the absence of other error, the Court would support the finding.

Judge Brosman wrote a separate concurring opinion indicating his satisfaction with the sufficiency of the evidence, without reference to the accused's failure to explain, and without discussing the broad principles of review stated by Judge Latimer.

But the Chief Judge in his dissent let out a ringing cry to rally his forces. He strongly condemned any use of the accused's failure to testify as giving aid and comfort to the prosecution's case. He then announced his liberal principle of review of sufficiency of the evidence by clearly stating the "reasonable hypothesis" rule "... there must be substantial evidence consistent with guilt and inconsistent with any reasonable hypothesis of innocence." That, in fact, is the test indicated by the Manual for Courts-Martial. Judge Latimer had recognized this rule merely as providing guidance for the trial forum, and refused to consider it on appellate review.

The cry of Chief Judge Quinn did not go unheeded, and in the next case sharply raising the question of the sufficiency of the evidence Judge Brosman joined with him and wrote the opinion for the majority. In United States v. O'Neal, which has become the leading case on the subject, Judge Brosman adopted the reasonable hypothesis rule and applied it in reversing a conviction. Referring to the McCrary case, he stated:

However, we should not have said there [McCrary case], we did not intend to say there, nor did we say there, that their administration by such agencies is above and beyond the supervision of an appropriate appellate tribunal—by this Court, although limited to "action only with respect to matters of law." To hold the converse would effectively deprive appellate courts, including this one, of any sort of effective control over subordinate elements of the judicial scheme in an important area of law administration.
Chief Judge Quinn noted a separate concurrence, indicating that he thought the opinion of the McCrary case had stated otherwise, and Judge Latimer wrote a dissent indicating clearly that in the McCrary opinion he had intended otherwise. Judge Latimer expressed his fear that the Court was reviewing the facts contrary to the provision of the Code.

The O'Neal case has been followed by the Court since its announcement. In United States v. Shull,76 and United States v. Peterson,77 United States v. Ferretti,78 and United States v. Knaph,79 the Court has applied the reasonable hypothesis test, reversing in the former two cases, and affirming in the latter two. It is to be noted that these cases involved the charge of desertion, which requires the showing of intent. The problem of the sufficiency of the evidence is rendered particularly difficult in military cases because of the unusually large number of offenses involving the mental element, which, of course, can only be established by circumstantial evidence. Desertion, wilful disobedience, and cowardice all fall into this category, and are unique to military law. Cowardice in fact may involve proof of motive: that the misbehavior was impelled by fear.

The extent to which the Court of Military Appeals will review the findings of the court-martial is best illustrated by the case of United States v. Yarborough and Marshall.80 Marshall was charged with intentionally wounding himself, Yarborough with allowing himself to be wounded, and both with conspiracy and with misbehavior before the enemy by cowardice by reason of the same acts. The testimony showed that they were members of a company that was on the line in Korea, although they were headquarters personnel, and in a position 2,000 yards behind the line. During the afternoon of the day involved, they discussed, in the presence of others, ways of shooting themselves without being detected. They also talked about going to Japan, and Marshall picked up a carbine and pointed it at Yarborough's foot. Yarborough said "Go ahead, I don't give a damn." Another soldier said that he'd better not, as such accidents were being investigated by the Criminal Investigation Division. Both accused said that it made no difference to them, that they were going to Japan that evening, and that they didn't care how they got there. Later in the evening they simulated wounding themselves by overlapping their feet and pointing a carbine at them, so that if fired it would pass

through the foot of each. They continued to discuss ways that they could wound both of themselves with a single bullet. An hour later, and in the presence of another soldier, Marshall placed the index finger of his right hand over the big toe of Yarborough, who was lying in his tent, and was watching Marshall. Marshall placed a carbine so that the muzzle was an inch from his finger, the carbine discharged, and Marshall was wounded in his finger, Yarborough in his toe. Yarborough acted surprised when he was wounded. The witnesses indicated that there was always joking discussion among the soldiers of the command about wounding themselves, and that they had believed that Marshall and Yarborough had been joking. In defense, Marshall and Yarborough testified in their own behalf. Marshall admitted discussing shooting himself and Yarborough, but denied statements that he intended to go to Japan. He testified that he was merely moving the carbine in the tent when it accidentally discharged. Yarborough, too, admitted discussing wounding himself, but said he was merely resting in the tent, when the carbine was fired. He denied that he was watching Marshall. The court-martial convicted both men of all counts and sentenced them each to dishonorable discharge, total forfeiture of pay, and ten years confinement at hard labor.

The Court of Military Appeals reversed the finding of guilt as to Yarborough on all charges, and reversed the finding of guilt of misbehavior by cowardice as to Marshall. However, it affirmed the findings of guilt as to Marshall on the other charges. Chief Judge Quinn, writing the majority opinion, cited United States v. O'Neal, and listed several possible hypotheses: that Marshall intended to fire, and Yarborough intended he should; that Marshall intended to fire but that Yarborough did not intend to get shot; that Marshall was “play-acting” and did not know that the weapon was loaded; or that Marshall’s account was correct, the carbine being accidentally discharged while being moved. He discarded the last hypothesis, as the court-martial could have disbelieved Marshall’s story, which was inconsistent with that of other witnesses. He stated that only the first hypothesis would support the court-martial finding in toto. As to Yarborough he found that there existed reasonable hypotheses of innocence, and that the overt act alleged to support the charge of conspiracy as to him was not proved. As to Marshall, he stated that it might not be reasonable to believe that Marshall, an experienced soldier, would assume that the carbine was not loaded, and that Marshall’s own account of the incident was inconsistent with any other reasonable hypothesis of innocence. However, to support the charge

81. Supra n. 74.
of misbehavior before the enemy by cowardice in committing the acts as alleged, it was necessary to find that the acts were done through fear. There was no evidence that Marshall was motivated by fear, said the Chief Judge, "It is just as reasonable to assume that, sated with fighting, he was motivated by the desire to obtain a respite."

Judge Latimer dissented on the reversal of the conviction of Yarborough, pointing out that the matter of belief or disbelief of the inconsistent stories is a function of the court-martial.

This is not only an example of the extent of judicial review of the facts in determining sufficiency as a matter of law; it is a penetrating illustration of the difficulty involved in a military case.

The Court of Military Appeals has indicated in the cases involving the sufficiency of the evidence that it intends to fulfill its appellate function. In adopting the reasonable hypothesis rule as to sufficiency of the evidence it is being progressive and is offering the presumption of innocence in its full effectiveness.

CONSTITUTIONAL SAFEGUARDS OR THEIR EQUIVALENT

Though Congress had clearly indicated by the Uniform Code of Military Justice that most of the rights guaranteed by the Constitution should be extended to service personnel regardless of the state of the law preexisting, that battle was not won by the mere preparation of a plan. The argument still was available that these provisions are directive rather than mandatory on courts-martial; that if there is sufficient evidence of guilt beyond a reasonable doubt, then error, whatever it be, is not prejudicial to the accused.

The Court of Military Appeals lost no opportunity to indicate that it intended to implement the plan of Congress by requiring adherence to the safeguards provided. United States v. Clay82 involved the relatively minor offense of disorderly conduct, but the president of the special court-martial trying the accused failed to instruct the court as to the presumption of innocence, and the court-martial convicted. The Navy board of review affirmed the conviction, noting that there was error in the failure to charge as to the presumption of innocence, but finding that there was sufficient evidence to overcome this presumption and therefore holding that the error was not prejudicial. However, the Court of Military Appeals did not view it as a question of whether the

accused was innocent or guilty, but rather as to whether the accused had been accorded a trial on the question of his guilt or innocence. And in reversing the board of review, the Court of Military Appeals took occasion to indicate where it stood on the matter of the guarantees and safeguards of the accused. Judge Latimer, in writing the opinion of the court in which all concurred, stated:

(W)e look to the acts of Congress to determine whether it has declared that there are fundamental rights inherent in the trial of military offenses which must be accorded to an accused before it can be said that he had been fairly convicted.

There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses. Some of these are more important than others, but all are of sufficient importance to be a significant part of military law. We conceive these rights to mold into a pattern similar to that developed in federal civilian cases. For lack of more descriptive phrase, we label the pattern as “military due process” and then point up the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted. The Uniform Code of Military Justice, supra, contemplates that he be given a fair trial and it commands us to see that the proceedings in the courts below reach that standard.

Generally speaking, due process means a course of legal proceedings according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we cannot give the same legal effects to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes.

As we have stated in previous opinions, we believe Congress intended, in so far as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infected the old system. Believing this, we are required to announce principles consistent therewith.

Then the Court designated some of the rights paralleling those accorded to defendants in civilian courts which it considered Congress had granted to the accused before a military court:

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83. Id. at 77.
(1) To be informed of the charges against him.
(2) To be confronted by witnesses testifying against him.
(3) To cross-examine witnesses for the government.
(4) To challenge members of the court for cause or peremptorily.
(5) To have a specified number of members compose a general and special court-martial.
(6) To be represented by counsel.
(7) Not to be compelled to incriminate himself.
(8) To have involuntary confessions excluded from consideration.
(9) To have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof.
(10) To be found guilty of an offense only when a designated number of members concur in a finding to that effect.
(11) To be sentenced only when a certain number of members vote in the affirmative.
(12) To have an appellate review.

The Court was careful to indicate that it did not intend to make the list all-inclusive. On the other hand, it is to be noted that the court could have been referring to those protections only to the extent required by the Code, and not to the full extent recognized before civilian criminal courts. For example, the right to confrontation listed by the Court must be considered in the light of the provision of the Code allowing depositions in certain cases.84

84. U.C.M.J. Art. 49.
After discussing federal court authority, the Court indicated its intention to draw from there, where appropriate, in passing on questions of "military due process":

We can see no good reason why the principles announced in the foregoing cases should not be transplanted into the military system; and, insofar as applicable to our system, we adopt them. True, we need not concern ourselves with the constitutional concept, but if the denial of these benefits to a defendant is of sufficient importance to justify a civilian court in holding that it denied him due process, it should be apparent to a casual reader that denial of a similar right granted by Congress to an accused in the military service constitutes a violation of military due process. By adopting these principles we impose upon military courts the duty of jealously safeguarding those rights which Congress has decreed are an integral part of military due process.

And finally the Court admonishes commanders and members of courts-martial:

We may have belabored the importance of the question herein involved. If so, it is to impress on courts-martial the undesirability of short-cutting the plain mandate of Congress.87

The Clay case is indeed a milestone in military law. But the Court of Military Appeals has gone beyond errors in failing to grant the protection to the accused provided by Congress to require that the spirit as well as the letter of the congressional reforms be complied with. The failure to do this, it labels as "general prejudice," and considers it reason for reversal. The Court adopts this principle as "... within the sphere of this Court's effort in the sound content of opposition to command control of the military judicial process to be derived with assurance from all four corners of the Uniform Code of Military Justice."88

"General prejudice" is illustrated by the case of United States v. Barry.89 The president of a general court-martial usurped all the functions of the law officer, ruled on motion, admissibility of evidence, and advised the accused of his rights. The Court held that this was reversible error, as being generally prejudicial, a concept characterized as an "overt departure from some creative and indwelling principle—some critical and basic norm operative in the area under considera-

86. Supra n. 82 at 79.
87. Id. at 80.
The Court stated that to allow the president of the court-martial, who is freely selected by the commander, possibly more concerned with discipline than law, and almost certainly less well informed in law, to usurp the "judge-like" functions of the law officer, is to weaken, if not remove one barrier to command control.

Closely analogous to this principle is the holding of the Court in *United States v. Gordon*.

The accused was charged with attempting to burglarize the home of Brigadier General Lee, and with burglarizing the house of Lieutenant General Edwards. The accused confessed to both offenses, and General Lee was informed of the confession. General Lee then convened a general court-martial and referred the charges against the accused to it. Thereafter, and before trial, the charge of attempted burglarizing of the home of General Lee was dropped for lack of corroboration of the confession. The accused was convicted of burglarizing General Edwards' home, and the conviction was reviewed by General Lee, and was approved although the sentence was somewhat reduced. The board of review affirmed. The Court of Military Appeals reversed on the ground that General Lee was disqualified to act as convening authority, as there was such a possibility of hostility as to materially prejudice the rights of the accused. The reversal by the Court of Military Appeals would be expected, but the shocking fact is that a general officer apparently had such little sensitivity to justice as to think that it was all right, and that the board of review affirmed, apparently not finding anything in the "book" that specifically forbade the victim from being the convening authority. This is characteristic of certain boards of review that assume the position a glorified inspector general in searching the record for technical error rather than the deprivation of overall justice.

The fact is that the Court of Military Appeals has kept faith with command more than the boards of review in upholding convictions where there has been technical error but the substantial rights of the accused have not been prejudiced. One of the gravest fears of command has been that an overly technical application of the Code by the Court of Military Justice would completely disrupt the court-martial process. This has not occurred. The following are just a few examples of differences in approach of the boards of review and the Court of Military Appeals. In *United States v. Gilgallon*, the accused had been convicted by a

90. Id. at 146.
91. Id. at 147.
special court-martial and sentenced to be discharged from the service with a bad conduct discharge, to be restricted to his ship for two months, and to forfeit two-thirds of his pay for two months. The Navy board of review held that part of the sentence was invalid in that the forfeiture was stated in a percentage rather than in dollars and cents. The Manual for Courts-Martial, 1951, states that loss of pay shall be stated in dollars and cents. The Court of Military Appeals held that the court-martial error did not materially prejudice the rights of the accused, and stated, "we, of course, wonder why a question shrouded in such simplicity and with no prejudicial impact on the accused should reach this court." In United States v. Lee the Navy board of review reversed a conviction because the trial counsel (prosecutor) had previously conducted an informal investigation of the offense. The Court of Military Appeals reversed the board of review. In United States v. Goodson, a conviction was reversed by the Navy board of review on the ground that the trial counsel of a special court-martial was a warrant officer and not a commissioned officer. The Uniform Code of Military Justice makes no such requirement, but the Manual for Courts-Martial indicates that an officer shall be appointed trial counsel. The Court of Military Appeals reversed the board of review, holding that the rights of the accused had not been prejudiced. In United States v. Jones, the Navy board of review reversed a conviction for failure of the president of a special court-martial to instruct the court as to the elements of the offense, even though the accused had entered a proper plea of guilty. The Court of Military Appeals reversed the board of review.

It is apparent that the Court of Military Appeals has accepted the burden of securing for the members of our armed services protection equivalent to that provided to the civilian populace with a real sense of responsibility both to the accused and to the military services.

IMPLEMENTATION BY THE SERVICES

The adoption of the Uniform Code of Military Justice may have established relatively stable battle lines in the administration of military justice, but it did not produce a stalemate. Neither the Code nor the Court of Military Appeals can achieve the de-

94. MCM, 1951, par. 126 h. (1).
95. Supra n. 93 at 172.
98. MCM, 1951, par. 6.
sired results without the full cooperation, in spirit as well as letter, of the armed services. As Professor Morgan has stated, "If the superior officers in the services are determined to exercise improper control over the trial, no safeguard will suffice as long as the trial court is composed of military men."\textsuperscript{100}

As has been previously mentioned, the Uniform Code of Military Justice made an important innovation in the proceedings of courts-martial by separating the law officer from the court membership. Professor Morgan, testifying before a Congressional committee, stated, in answer to an inquiry as to 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."\textsuperscript{101} He also emphasized the intent to strengthen the law officer's power and position in order that he might be able to make independent decisions on legal issues free from possible influence by court members senior to or more influentially placed than he.\textsuperscript{102} The Court of Military Appeals has several times remarked as to the similarity of the law officer to the civilian judge. In \textit{United States v. Kieth},\textsuperscript{103} the Court stated: "No one who has read the legislative history of the Code can doubt the strength of the Congressional resolve to break away completely from the old procedure, as far as legislatively possible, that the law officer perform in the image of the civilian judge."\textsuperscript{104} And in another case the Court stated with reference to the law officer: "He is the external and visible symbol of the law in a process which has long been characterized as juristic and must be genuinely regarded as such."\textsuperscript{105}

\begin{footnotes}
\footnotetext[100]{Morgan, \textit{Background of the Uniform Code of Military Justice}, 6 \textit{VAND. L. REV.} 169, 184 (1953).}
\footnotetext[101]{\textit{House Hearings on Uniform Code of Military Justice, Committee on Armed Services}, 607.}
\footnotetext[102]{\textit{Id.} at 671-673.}
\footnotetext[103]{\textit{Id.} at 671-673.}
\footnotetext[104]{\textit{Id.} at 88.}
\footnotetext[105]{\textit{United States v. Berry, supra} n. 89 at 146.}
\end{footnotes}
MILITARY JUSTICE, COMMAND, AND FIELD SOLDIER

These cases involved the function of the law officer and not his physical position in the court room. Appendix 8 of the Manual for Courts-Martial, 1951, however, provided a diagram of acceptable seating arrangement as set out below:

The resemblance to a federal district courtroom is plain. But the Army turns the book and in this instance reads it from its left side so that the members of the court form the front of the courtroom, and the law officer is relegated to a position the equivalent of the prisoner’s box in a civilian court. The diagram above is merely two dimensional, and so the Army has taken the liberty to raise the members of the court by constructing a platform under them, but not showing the same consideration for the law officer. The law officer sits down and over there at the left of the court next to the court reporter. The president of the court addresses him in the same tone as used in requesting the reporter to read back a question or answer.

106. The Army is not completely without justification, for the Manual for Courts Martial is inconsistent in its reference to the president as senior officer of the court having the duty to preserve order. MCM, 1951, par. 40 b.

107. The foregoing is based on the writer’s observation of courts-martial in Korea and Japan in 1951 and early 1952.

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So this is the "image of a civilian judge," this is the "external and visible symbol of the law." It would seem that in tipping the book the Army has spilled much of the prestige of the law officer and the law, and has made the military rather than the law the dominant note of a court-martial proceeding.

Undoubtedly the greatest amount of criticism of the conduct of courts-martial, and certainly the largest number of cases involving errors in failing to extend military due process, arise in special courts-martial. It is also in this area that command influence has its greatest effect. The special court-martial tries the less serious, though not minor, offenses. Its jurisdiction to sentence is limited to confinement for six months, forfeiture of two-thirds pay for six months, and a bad conduct discharge.\textsuperscript{108} It consists of at least three officers, and may be appointed by a regimental or separate battalion commander in the Army and the corresponding commander in the other services.\textsuperscript{109} There is no law officer, and generally neither the trial counsel nor the defense counsel is a lawyer, though if the trial counsel is a lawyer the defense counsel also must be a lawyer.\textsuperscript{110} There is no verbatim record taken of the proceedings of a special court-martial unless a sentence to a bad conduct discharge is contemplated. However, a summarized record of the trial is prepared by the trial counsel and authenticated by the president of the court-martial.\textsuperscript{111}

Untrained in law, the president of a special court-martial generally is utterly incapable of ruling correctly on difficult motions, questions of evidence, and instructing the court on the elements of the offense.\textsuperscript{112} But beyond this, the members of the court usually have no "feel" for due process, and are apt to treat the proceedings as a formal rite. Their proclivity to mistake due to their unfamiliarity with the subject, makes the members of the court extremely conscious of the possibility of incurring the disfavor of their superiors, and peculiarly susceptible to command influence. Trial counsel in special courts-martial have been found incapable of properly preparing summarized records, and therefore printed forms are now provided and mere words and phrases are filled in to constitute the record. This, of course does not in any way reflect the real proceedings, and if anything was omitted on the trial, it will be filled in on the record to avoid reprimand. The

\textsuperscript{108} U. C. M. J. Art. 19.
\textsuperscript{109} U. C. M. J. Art. 23.
\textsuperscript{110} U. C. M. J. Art. 27 (c).
\textsuperscript{111} MCM, 1951, par: 83.
\textsuperscript{112} The writer recalls hearing counsel in a special court-martial reprimanded by the court for impertinence in implying criticism of the manner in which the court was observing the case, because he asked the court to take "judicial notice" of a fact.
record of a special court-martial generally forms no adequate basis for appellate review.

The difficulty is that the entirely understandable sins of the special courts-martial are visited upon the system of military justice as a whole. In complaining about an injustice done to him by a court-martial the soldier does not differentiate as to what type of court-martial it was, and the entire system of military law is brought into disrepute.

In the field of the general courts-martial considerable censure can be leveled against members of the Judge Advocate General’s Departments for failure of many of them to grasp the full responsibility that has been placed on them by the Uniform Code of Military Justice. Judge Latimer of the Court of Military Appeals has stated:

> From the records I have reviewed since the court opened for business I have concluded that representation on the trial level is not of the best, and, in my opinion, if the present act fails to accomplish the desired reforms it will be largely because of poor representation on that level. A reviewing tribunal is limited in its sphere of review and obviously it cannot eliminate the evils flowing out of unprepared, ill-advised, and careless representation.  

For some reason, defense counsel often does not accept the burden of the defense with the sense of responsibility of a civilian lawyer. Very often defense counsel does not see the accused except to interview him once before the trial. This is better than it used to be! Almost invariably the defense counsel fails to perform an independent investigation. Of course, there is a reason for this, as in the services the defense counsel’s time is not his own, nor does he have the facilities to conduct an investigation. One answer to this problem that has been suggested is that the Judge Advocate General’s Departments form a separate defense corps, with the work of its members under the supervision of a senior chief defense counsel. However, this involves the personnel problem of lack of sufficient law trained officers to permit an economical segregation within the Judge Advocate General’s Departments.

The matter of sentencing persons convicted by courts-martial has continued to raise considerable difficulty. The Uniform Code of Military Justice provides, as did the Articles of War, that the court shall adjudge the sentence, and provides for review by the

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The reviewing authority may reduce the sentence but he cannot increase it. A requisite of fixing sentences either by civilian criminal courts or courts-martial is a degree of uniformity. The court-martial, in the relative position of a jury under the new Code of Military Justice, is an inherently illogical body for fixing sentence, as it cannot achieve the necessary uniformity. The result has been the establishment of a practice by the courts-martial of imposing unreasonably severe sentences, in order to allow the convening authority to reduce the sentence if he desires. Actually this is more than a mere practice of the courts. It is a rule that in the past has been set down in no uncertain terms by command, and the officers of the services continue to be imbued with the idea. This practice, of course, is an abdication by the court-martial of a function assigned to it by the legislature. Even more damaging is the fact that it is generally recognized by the troops that the practice exists, and to them it is concrete evidence of the subordination of the courts-martial to command. The problem is difficult, but it is certain that it cannot be solved as long as the courts-martial retain the function of adjudging sentence. It might be possible to extend the similarity of the law officer to the civilian judge by assigning the sentencing function to him, for sake of achieving uniformity, with perhaps the right reserved to the courts-martial to make recommendations, in order to preserve the military judgment on the seriousness of the offense.

CONCLUSION

One fact should be plain to the military services: Congress intends to extend fair judicial treatment to the members of the armed forces. If the present system does not accomplish this, then any change that Congress will make will be a further deprivation of the control of the military. If the armed services subvert the purposes of the Code of Military Justice, as they have the capacity to do as indicated by what has happened to unification legislation, they will have "fought the problem" and lost the battle. On the other hand, the armed services have the opportunity to demonstrate that the present system will work without further drastic divesting of military power over the court system. The burden of proof would seem to be on the military, and it can be met only by affirmative efforts to make the present system work.

115. U.C.M.J. Art. 64.
117. Cf. Weber, CM 274903. The accused was sentenced to be hanged for wilful disobedience of an order to join his squad for training. The reviewing authority reduced it to 5 years' confinement, and a clemency board reduced it to 3½ years' confinement.
It is also clear that the present system is not completely workable in its present exact pattern. Adjustments and improvements are in order, and they may be made at the instigation of the armed services, or on recommendations of the Court of Military Appeals, or by Congress acting independently. These adjustments necessarily affect the military in its primary mission: They should be designed to interfere with the military establishment to the smallest possible extent. It would seem obvious that the military, having the greatest familiarity with its problems, is the most appropriate body to effect, initiate or sponsor the necessary adjustments.

The Court of Military Appeals, in its supervisory capacity, has indicated the areas which it presently has under consideration. It has made one major recommendation:¹¹⁸ that the power to grant bad conduct discharges be denied special courts-martial. Its reasons seem impelling, and the Judge Advocates General of the Army and Air Force agree. The Judge Advocate General of the Navy and the Treasury Department (Coast Guard) disagree. The apparent reasons for disagreement¹¹⁹ involve problems of personnel and administration rather than justice.

The writer proposes the following, not as recommendations, but rather as some areas of possible consideration in making adjustments to the present system:

(1) Should the special courts-martial and their jurisdiction be taken completely from under the system of military justice and placed in the area of military discipline as perhaps "disciplinary boards"? There is little resemblance in actuality between special and general courts-martial. Special courts-martial can never approach the necessary standards of military justice which Congress has ordained, without a tremendous addition of law trained personnel, which would not be administratively or economically feasible. The records of special courts-martial proceedings are not sufficient for adequate review. The sentences of the special courts-martial, except the bad conduct discharge, removal of which has been recommended, do not transcend the normal period of military service. Of course, it is recognized that some limitation would be required, as confinement time is not "good" time in computing the period of service. The presence of the special courts-martial under the tent of military justice serves only to bring into question the integrity of the entire system.

¹¹⁸. Supra n. 63.
(2) Should not the general articles of "Conduct Unbecoming an Officer,"120 and "Conduct of a nature to bring discredit to the service,"121 be removed from the punitive articles of the Code, and placed in the jurisdiction of disciplinary boards as indicated in (1) above? These articles do not set out an offense with sufficient definiteness to meet the standard of equivalent civilian justice. If the offense is serious it should be chargeable under one of the specific articles, or the specific articles should be expanded to set out with sufficient definiteness any such serious offenses. The possibility of conviction by courts-martial under such vague articles reflects discredit upon the system of military justice.

(3) Should not the provision for mandatory review by the Court of Military Appeals in the case of conviction of a general or flag officer be removed? There are few such cases, and a likelihood that review would be granted in what cases there are. The matter of the rank of the accused has no special place where justice is involved. The present provision has little importance, but it "reads badly" in its inconsistency with principles of justice.

(4) Should not the functions and position of the law officer be clarified and extended to give him the title of "Judge," the duty of presiding over the courts-martial, and the sentencing function on the recommendation of the court?

(5) Should not a defense corps be established within the Judge Advocate General's Department, under the supervision of a Defense Chief and with full responsibility for the conduct of a proper defense by assigned counsel? The savings of legal personnel by eliminating the special courts-martial from the system of military justice as indicated by (1) above should make this feasible.

There is great encouragement to be derived from the present picture of military justice, not the least of which comes from the indication of civilian interest in the subject. The subject of military law and the workings of the Court of Military Appeals provide perhaps the best study in jurisprudence of our times. Beyond this the subject is vital to our national survival.

120. U. C. M. J. Art. 133.
121. U. C. M. J. Art. 134.