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Harold F. McNiece

John V. Thornton

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Military Law from Pearl Harbor to Korea

Cover Page Footnote

Professor of Law, St. John's University School of Law. * Instructor in Law, New York University School of Law.

MILITARY LAW FROM PEARL HARBOR TO KOREA

HAROLD F. McNIECE† & JOHN V. THORNTON‡

ON DECEMBER 7, 1941, the Japanese military forces attacked Pearl Harbor, and precipitated United States entry into World War II. At that time the body of America's military law was much the same as it had been for many years in the past. Indeed the Articles which governed the Navy¹ were not unlike Cromwell's Articles of 1649,² and the Army was ruled by a statute which still bore the marks of an ancient Roman predecessor. This is not to say that the military law system was crumbling and inefficient. Particularly because of the high caliber of its administrators, the system was operating reasonably well, but, like any body of law which exists for many years without change, it was in need of modernization.

Some ten years later America is again at war, if the Korean "police action" be given a name befitting its *de facto* status. But today the United States system of military justice, while still in some ways imperfect, is probably as modern as any in the world. The administration of military law in all branches of the military and naval service is now regulated by the recently enacted and forward looking Uniform Code of Military Justice.³ This statute provides a substantially greater number of trial and pretrial safeguards for accused persons than did the older laws, and it establishes for the first time a civilian Court of Military Appeals⁴ as the highest tribunal within the court-martial system.

The purpose here is to study this decade of progress. First the status of military law at the time of Pearl Harbor is set forth. Consideration is next given to the proposals for court-martial reform which were put forth during and after World War II, and to the Uniform Code of Military Justice,⁵ which emerged as the end product of the reform movement. Analysis is made of major deficiencies which still exist in the statutory framework of military law as represented by the Code, and attention is paid to opinions rendered by the newly established Court of Military Appeals. It is too early to formulate definitive con-

† Professor of Law, St. John's University School of Law.

‡ Instructor in Law, New York University School of Law.

1. REV. STAT. 1624 (1875).

2. Pasley and Larkin, *The Navy Court-Martial: Proposals for its Reform*, 33 CORNELL L.Q. 195, 198 (1947).

3. Pub. L. No. 506, 81st Cong., 2d Sess. (May 5, 1950) (Effective May 31, 1951); 64 STAT. 108 (1950); 50 U.S.C.A. §§ 551-741 (Supp. 1951).

4. Established by the UNIFORM CODE OF MILITARY JUSTICE, Art. 67, 64 STAT. 129, 50 U.S.C.A. § 654 (Supp. 1951).

5. See note 3 *supra*.

clusions about the work of that court, but some tentative insights into its attitudes can be gleaned.

Following discussions of statutory changes and decisions of the Court of Military Appeals, study is made of leading federal civil court decisions during the past ten years. Developments in judicial review of courts-martial and military commissions are touched upon, and some general conclusions are offered.

AMERICAN MILITARY LAW AT THE TIME OF PEARL HARBOR

On December 7, 1941, Army personnel were governed by the Articles of War,⁶ and Navy personnel by the Articles for the Government of the United States Navy.⁷ The origins of both of these statutes reached far back into antiquity.

The bedrock of the Articles of War was the British Articles of 1774,⁸ and these were of ancient vintage. In fact, John Adams, who was responsible for their speedy adoption by the Continental Congress to meet an emergency,⁹ described them as "only a literal translation of the Roman."¹⁰ Adams appreciated the rigorous character of the British Articles, and he never expected them to be enacted on this side of the Atlantic without a good deal of liberalization.¹¹ Those were days of great haste, however, and, as it turned out, the British Articles were adopted without real change. These Articles, despite repeals, reenactments, rearrangements, and reclassifications,¹² remained in basic pattern the same through World War I.¹³

World War I, like World War II, gave birth to movements for changes in military law, but these movements came to naught. In 1920 the Chamberlain Bill, proposed many important modifications in the

6. 41 STAT. 787 (1920).

7. See note 1 *supra*.

8. Ansell, *Military Justice*, 5 CORNELL L.Q. 1, 3-4 (1919); Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52 (1919); Keeffe, *Universal Military Training With or Without Reform of Courts-Martial?* 33 CORNELL L.Q. 465, 467 (1948).

9. Ansell, *supra* note 8.

10. 3 CHARLES F. ADAMS, WORKS OF JOHN ADAMS 93 (1850). John Adams says of the origin of the American articles: "There was extant one system of articles of war, which had carried two empires to the head of command, the Roman and the British, for the British Articles of War were only a literal translation of the Roman. . . . I was therefore for reporting the British articles *totidem verbis*. . . . The British articles were accordingly reported." See also Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 15, 17-19 (1949).

11. Ansell, *supra* note 8, at 4.

12. Detailed in Morgan, *supra* note 8, at 52 n. 1, and Ansell, *supra* note 8, at 4-5.

13. *Ibid.*

Army system,¹⁴ was defeated, and only small changes were made.¹⁵ The legislative situation remained virtually static thereafter. Thus in 1941 the ancient hand of Rome was still a force in Army justice.

The Navy court-martial system was somewhat newer in origin than the Army one. But this relative youth was counterbalanced by the fact that the Navy system did not experience the slight overhaul that the Army procedures received in 1920. The first American naval articles were, like the Army ones, compiled by John Adams from their British counterpart.¹⁶ These British Articles (of 1749) were essentially Cromwell's Articles of a hundred years earlier.¹⁷ Since very few changes were made in the basic framework of the British Articles after their adoption over here,¹⁸ the American naval law in force at the time of Pearl Harbor still had a distinct flavor of Cromwell's Articles of three hundred years before.

PROPOSALS FOR STATUTORY REFORM DURING AND AFTER WORLD WAR II

World War II, of course, brought a tremendous and rapid increase in the armed forces. A military justice mechanism which had been functioning well enough in a small peacetime Army and Navy of volunteers was suddenly forced to operate in a vast wartime establishment composed largely of conscripts. Any inherent defects were complicated by the necessity of employing inexperienced men among the personnel of court, prosecution, and defense.¹⁹ Some abuses occurred. How widespread they were is still a matter of unresolved speculation. It now seems clear that the abuses were far fewer than was commonly supposed. But whether the abuses were in fact many or few is not important for the public commenced to *believe* that they were many.

As a result public confidence in military justice ebbed considerably.

14. S. 64, H.R. 367, 66th Cong., 1st Sess. (1919). The Chamberlain Bill eliminated review of court-martial findings by the convening authority or any other superior military authority, and established a court of military appeals.

15. By 41 STAT. 759-812 (1920); Keeffe, *supra* note 8. Principal changes included the requirement of an impartial pre-trial investigation, the provision of a "law member" for every general court-martial, and the establishment of Boards of Review in the Office of the Judge Advocate General to review certain types of serious cases.

16. Pasley and Larkin, *supra* note 2, at 196-8.

17. There were predecessors to Cromwell's Articles such as *THE BLACK BOOK OF THE ADMIRALTY*, prepared in 1351, and the Ordinance of Richard I of 1190, but these had little lasting influence. *THE BLACK BOOK OF THE ADMIRALTY*, edited by Sir Travers Twiss, was republished in London in 1871, and the Ordinance of Richard I is reprinted in WINTHROP, *MILITARY LAW AND PRECEDENTS* 903 (1895 ed., 1920 reprint).

18. Some important changes, of course, did occur between 1774 and 1941, but these were far fewer than is sometimes supposed.

19. Cramer, *Military Justice and Trial Procedure*, 29 A. B. A. J. 368, 370 (1943).

During the latter part of World War II and immediately after its termination, there was a barrage of criticism directed at substantive military law and its administration. It is unnecessary to detail specific cases of alleged abuses to which much publicity was given, and which have been summarized elsewhere.²⁰ Suffice it to say that the volume of criticism—much of which in retrospect seems unjustifiable—was great enough to cause the services themselves to look into the possibilities of reform.

In 1946 the Secretary of War appointed the War Department Advisory Committee on Military Justice, headed by Arthur T. Vanderbilt, now Chief Justice of New Jersey, to make an analysis.²¹ The House Military Affairs Committee of the 79th Congress likewise made an extensive study.²² Similar developments took place in the Navy. A committee under the chairmanship of Arthur A. Ballantine, former Under-Secretary of the Treasury, submitted one report in 1943²³ and another in 1946.²⁴ Other investigations were conducted by Father Robert J. White,²⁵ Judge Matthew F. McGuire,²⁶ and Prof. Arthur John Keeffe.²⁷

The findings and recommendations of these numerous groups naturally varied in details. Surprisingly enough, however, the core of their suggestions was much the same. Typical were those of the War Department Advisory Committee.²⁸ The Committee made no general indictment of military justice. It found, for example, that the oft-repeated charge that innocent persons were convicted by courts-martial was untrue. It discovered, however, that sometimes sentences were imposed which were entirely disproportionate to the offenses.²⁹ Then too, it

20. See Wallstein, *The Revision of the Army Court-Martial System*, 48 COL. L. REV. 218, 221-30 (1948), and Pasley, *supra* note 2, at 28-32 for specific instances.

21. The committee's findings are contained in REPORT OF WAR DEP'T ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SEC'Y OF WAR (Dec. 1946).

22. H.R. REP. NO. 2722, 79th Cong., 2d Sess. (1946). In 1947 the Association of the Bar of the City of New York appointed a committee to consider reforms in military justice, headed by Frederick P. Bryan. See REPORT OF ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MILITARY JUSTICE (1948). The New York State Bar Association also appointed a Special Committee on the Administration of Military Justice under the Chairmanship of former Justice Phillip J. McCook.

23. REPORT OF BALLENTINE COMMISSION TO THE SEC'Y OF THE NAVY (Sept. 1943).

24. REPORT OF BALLENTINE COMMISSION TO THE SEC'Y OF THE NAVY (April 1946).

25. WHITE, A STUDY OF 500 NAVAL PRISONERS AND NAVAL JUSTICE (Jan. 1947).

26. REPORT OF THE MCGUIRE COMMISSION TO THE SEC'Y OF THE NAVY (Nov. 1945).

27. REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY (Jan. 1947).

28. These are detailed in its REPORT, *supra* note 21, and summarized in Holtzoff, *Administration of Justice in The United States Army*, 22 N.Y.U.L.Q. REV. 1 (1947).

29. This is perhaps best shown by the fact that the Secretary of War appointed a

reported, some commanding officers apparently felt that they were free to influence the decisions of courts-martial appointed and reviewed by them, especially in regard to sentences. As a result courts-martial were sometimes instructed to impose maximum sentences and leave it to the commanding officer (as reviewing authority) to reduce them to the proper figures.³⁰ It also happened that courts-martial were occasionally reprimanded orally by commanding officers, and now-and-then even in writing, because of the imposition of "inadequate" sentences.³¹ The net effect of these pressures was to take away the independence of such courts-martial as were affected by them and to transfer some of the court-martial functions to commanding officers.

Another defect was the failure, in some instances, to employ legally trained personnel to perform law work. It was not uncommon to use laymen as law members or defense counsel of courts-martial. Under the stress of war conditions the Armed Forces apparently failed to recognize law as a profession in the same sense in which they recognized medicine.³² Whereas every physician taken into the service was given a commission and assigned medical duties, lawyer applicants for commissions were frequently told that there was no room for lawyers as such in a wartime military organization. When these lawyers volun-

Clemency Board to review all sentences of imprisonment and reduce the excessive ones. Holtzoff, *supra* note 28, at 10, states that, "some sentences border on the fantastic. A seventy-five year sentence is not unknown, and fifty or twenty-five year sentences for infractions of discipline are not uncommon." Another difficulty was the disproportion in sentences between the Army and Navy. The Navy, for example, has not executed a man since 1842 when Midshipman Philip Spencer, a nephew of the Secretary of War, was hanged for conspiring to mutiny (See David, *An Episode in Naval Justice*, LOS ANGELES B. BULL. (Feb.-March 1952)), whereas the Army, including the Air Force, from 1942 to 1948 executed 93 men for murder, 52 for rape, and 1 for desertion. J.A.G. JOURNAL 21 (Nov. 1951). There were also differences in the length of sentence between the two services for less serious offenses. Keefe, *Universal Military Training With or Without Reform of Courts Martial?* 33 CORNELL L.Q. 465, 469-70 (1948).

30. In a series of desertion cases tried at Norfolk, Virginia, the courts-martial uniformly imposed a sentence of 15 years which the Admiral at Norfolk reduced in each case to 3 years. REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY § 1, pp. 1-12 (1947).

31. Holtzoff, *supra* note 28, at 9.

32. *Id.* at 11. Justice Holtzoff states: "This attitude was illustrated by a retired Army Colonel who testified at one of the hearings before the Advisory Committee. He stated that in his opinion the law member of a general court-martial did not have to be a lawyer, since he was given a Manual which he could study and which would guide him in making his rulings. The writer, who presided at the hearing, asked the witness whether he would be willing to designate a layman as a regimental doctor, if the latter would study a brief pamphlet on medicine. Naturally, the witness had no answer to make."

teered or were inducted, they were very often assigned non-legal duties. Yet later on the Armed Forces sometimes sought to excuse the failure to appoint lawyers as law members and defense counsel of courts-martial by asserting that they were unavailable.³³

The Committee also unearthed instances of discrimination in the military legal system in favor of officers and against enlisted men. Minor misconduct particularly was at times overlooked in the case of officers but punished when enlisted men were involved.³⁴

To meet these and other difficulties, a number of recommendations were made. Principally the Committee expressed the view that "command control" of courts-martial should be eliminated by taking away the power to appoint courts-martial from commanding officers and giving it to the Judge Advocate General. The Committee would, however, have allowed commanding officers to retain the power to reduce sentences. It further urged that the law member of every general court-martial, as well as the trial judge advocate and defense counsel, be lawyers in every instance. In addition it was recommended that the Judge Advocate General's Department be enlarged and made more independent in order to perform the additional services visualized.

THE UNIFORM CODE OF MILITARY JUSTICE

As a result of the widespread discussion and criticism of the court-martial system,³⁵ and the work of these various committees, reform in military justice progressed from theoretical discussion to actuality. It is unnecessary here to deal with the various interim and stop-gap measures which appeared on the scene, and the discussion will be limited to the general picture.

Both the War and Navy Department submitted separate "reform

33. Illustrations of cases involving inadequate legal representation are given in Wallstein, *supra* note 20, at 226-9.

34. *Id.* at 229-30.

35. The good features of the military court system should not, of course, be overlooked. In a number of respects the civil system can learn from the military. As Prof. Wigmore once put it, "In established military trial procedure, three measures are in regular practice, which are lacking in ordinary civilian criminal procedure. First, in felony cases the accused is furnished counsel without charge. Secondly, the accused is furnished gratis one of the three complete transcripts of everything that takes place at the trial. Thirdly, the record of the trial is automatically sent up to the Appellate Tribunal for review, without cost to the accused. Of these three features, the first one is taken care of already by the Public Defender System where it has been established. But the second and third, so far as I know, are totally lacking. I believe that the lack of those two features constitutes an unforgivable defect in our criminal procedure." Quoted in Cramer, *supra* note 19.

bills" early in the 80th Congress.³⁶ During the first session of that Congress there was passed the National Security Act of 1947 which sought to unify the armed forces. The Chairman of the Senate Armed Services Committee then suggested that the Secretary of Defense prepare a bill providing for a uniform legal system for all the military services. In response to the suggestion Secretary Forrestal in July, 1948 appointed a special committee, under the chairmanship of Prof. Edmund Morgan, to draft a uniform code. An intensive seven-month study was conducted by the Morgan Committee, and the end result was a proposed bill. Extensive hearings were then held, with representatives of the Morgan Committee, veterans' associations, bar associations, Reserve officers' association, and the Judge Advocates General of the armed services appearing to testify. Finally emerged the Uniform Code of Military Justice,³⁷ a composite of the ideas of many persons and groups.³⁸

Perhaps the most important reform the Code introduces is the establishment of a Court of Military Appeals composed of three civilian judges.³⁹ Functioning as the "Supreme Court" of the revised system,

36. H.R. No. 2575, 80th Cong., 1st Sess. (1947); S. 903, 80th Cong., 1st Sess. (1947); S. 2229, 80th Cong., 3d Sess. (1948) (Army bill); H.R. No. 3687, S. 1338, 80th Cong., 1st Sess. (1947) (Navy bill). The program of the War Department is discussed in Royall, *Revision Of The Military Justice Process As Proposed By The War Department*, 33 VA. L. REV. 269 (1947). The origins of the Code are also traced in Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

37. See note 3 *supra*.

38. For legislative history of the UNIFORM CODE OF MILITARY JUSTICE, see SEN. REP. NO. 486 (June 10, 1949); U.S. CODE CONG. SERV. NO. 4, pp. 886, 889-90 (1950). The commentators have generally received the Code favorably. Cf. the dissenting views of Keefe and Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 151 (1949).

The New English Courts-Martial (Appeals) Act, 1951, 14 & 15 Geo. 6, c. 46 has many similarities to the Uniform Code. Under the British Statute a Courts-Martial Appeal Court is set up analogous to our Court of Military Appeals. Like the American Code, the English Act applies to the three branches of the armed forces with unimportant differences. However, all appeals are by leave of the court, whereas some appeals are mandatory under our Code.

The Lewis Committee in England recommended that appeals should be on questions of law alone but the Act as passed contains no such limitation. From the decision of the appellate tribunal there can be a further appeal to the House of Lords if either side applies to the Attorney-General and he gives a certificate that a point of law of exceptional public importance is involved. See Griffiths, *Courts-Martial (Appeals) Act, 1951*, 15 MODERN L. REV. 65 (1952); Pasley, *A Comparative Study of Military Justice Reforms in Britain and America*, 6 VAND. L. REV. 305 (1953).

39. UNIFORM CODE OF MILITARY JUSTICE, Art. 67, 64 STAT. 129, 50 U.S.C.A. § 654 (Supp. 1951). The court reviews the record in the following cases:

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

the new tribunal is located for administrative purposes in the Department of Defense but is completely independent of military control.⁴⁰ After less than a year of active operation, the court was docketing cases at rates which indicate that it will have a yearly volume considerably greater than that of the United States Supreme Court.⁴¹ As of the middle of 1952 the total number of petitions for review which had been filed represented approximately 10% of the total number of cases in which a convicted serviceman was eligible to file, and the rate was increasing.⁴²

Another improvement brought forth by the Code tends to insure a more able trial tribunal. The new statute makes it an absolute requirement that trial and defense counsel in a general court-martial be trained legal personnel certified as competent by their Judge Advocate General.⁴³ Under the former procedure legal personnel had to be used only "if available," and availability was a matter within the convening authority's largely uncontrolled discretion.⁴⁴

(2) All cases reviewed by a board of review which the Judge Advocate General orders forwarded for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court has granted a review.

40. Congress did not intend the court to be subject to the "authority, direction, or control of the Secretary of Defense", as the legislative history shows. SEN. REP. No. 486 (June 10, 1949); U.S. CODE CONG. SERV. No. 4, pp. 886, 918 (1950). The first bench, a most distinguished one, is made up of Chief Judge Robert E. Quinn, former Governor of Rhode Island and Judge of the Superior Court there; Judge George W. Latimer, former Associate Justice of the Utah Supreme Court; and Judge Paul W. Brosman, former Dean of Tulane Law School.

41. Walker, *The United States Court of Military Appeals: A Long Overdue Addition to the Judiciary*, 38 A.B.A.J. 567 (1952). During the first sixteen months of its operation over 1700 cases were filed with the court and final action completed in some 1300 of them. Walker and Mebank, *The Court of Military Appeals—Its History Organization & Operation*, 6 VAND. L. REV. 228 (1953).

42. *Ibid.* Other recent articles discussing the Court of Military Appeals include Garraty, *United States Court of Military Appeals*, JAG JOURNAL 3 (March, 1952) and Spindler, *The Uniform Code of Military Justice—New Rights and a Means to Enforce Them*, 50 MICH. L. REV. 1084 (1952). For general discussion of the Code the best articles seem to be Prof. Re's, *The Uniform Code of Military Justice*, 25 ST. JOHN'S L. REV. 155 (1951) and Admiral Russell's paper of the same name in 19 GEO. WASH. L. REV. 233 (1951). See also Butts, *The Uniform Code of Military Justice*, 22 MISS. L.J. 203 (1951); Larkin, *The Military Justice Code and You*, J.A.G. J. 3 (April, 1951). Cf. Brigadier Lawson's article tracing the changes effected in Canadian military law by the National Defense Act of 1950, 14 GEO. VI, c. 43. *Canadian Military Law*, 29 CAN. B. REV. 241 (1951).

43. UNIFORM CODE OF MILITARY JUSTICE, Art. 27, 64 STAT. 117, 50 U.S.C.A. § 591 (Supp. 1951).

44. Art. of War II, 62 STAT. 629, 10 U.S.C.A. § 1482 (Supp. III, 1950); *Hiatt v. Brown*, 339 U.S. 103 (1950).

The new Code also provides for a legally qualified person to be appointed as "law officer" of a general court-martial⁴⁵ The law officer, who is not a member of the court, supplants the former "law member," and is much more a full-fledged "judge" than was the law member.⁴⁶

DEFICIENCIES IN THE UNIFORM CODE

Some experience has now been accumulated under the Uniform Code, and the First Annual Report of the Court of Military Appeals and the Judge Advocates General has appeared.⁴⁷ This First Report, covering the period from May 31, 1951 to May 31, 1952, recommended that Congress take no action at this time on most of the changes which have been proposed in the Uniform Code, pending further experience in its administration.⁴⁸ It was urged, however, that legislation be enacted prohibiting special courts-martial from adjudging bad conduct dis-

45. UNIFORM CODE OF MILITARY JUSTICE, Art. 26, 64 STAT. 117, 50 U.S.C.A. § 590 (Supp. 1951).

46. See UNIFORM CODE OF MILITARY JUSTICE, Art. 51, 64 STAT. 124, 50 U.S.C.A. § 626 (Supp. 1951); Art. 39, 64 STAT. 121, 50 U.S.C.A. § 614 (Supp. 1951). It may be expected that the Court of Military Appeals will be diligent in protecting the prerogatives of the law officer, if *U.S. v. Berry*, 2 CMR 141 (1952), is representative of its attitudes (usurpation by president of court-martial of law member's functions held error on basis of general prejudice). But *Cf. U.S. v. Jones*, No. 79, USCMA (1952).

47. ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES (1952). The Report is required by Art. 67 of the Uniform Code. 64 STAT. 129, 50 U.S.C.A. § 654 (Supp. 1951). That article in subdivision g provides: "The Court of Military Appeals and The Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this chapter and report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this chapter, and any other matters deemed appropriate."

48. *Id.* at 3-4. The REPORT listed as some of the suggestions: "A procedure for appropriate appellate review in the event of the increase work load which would result from a war or national emergency; the creation of a separate Judge Advocate General's Corps for the Navy and Air Force or the abolition of the separate promotion list of the Judge Advocate General's Corps of the Army and restoration of Army Judge Advocates to their proper positions on the Army promotion list; an appropriate non-command channel for processing efficiency or effectiveness reports; the convening of courts by others than commanding officers; a further limitation on command control over the administration of military justice; a return to the prior law member procedure; a limitation on the jurisdiction of special courts-martial to adjudge punitive discharges; a provision for the court to review questions of fact; an authorization for the court to reduce sentences when they are considered excessive as a matter of fact or when a part of the findings only are affirmed; revision of service personnel regulations; and, the elimination of time-consuming and costly procedures which are not material to the substantial rights of an accused person."

charges.⁴⁹ Since bad conduct discharge is in most respects just as severe a punishment as a dishonorable discharge,⁵⁰ and a special court-martial does not provide the same safeguards for an accused as does a general court,⁵¹ the recommendation, at least insofar as it pertains to the Army and Air Force, seems thoroughly sound.⁵²

The Report reveals a number of administrative difficulties which have arisen, such as lack of adequate office space and quartering facilities for the Court of Military Appeals,⁵³ and a shortage of lawyer officers⁵⁴ and court-reporters.⁵⁵ These problems are of no great long run concern, however, since they are of the type that naturally accompany a general transition and just as naturally work out with the passage of time.

From analysis of the Report, it seems clear that the Armed Forces are making a genuine effort to implement the forward-looking spirit of the Code.⁵⁶ The Judge Advocates General are particularly to be complimented on the work they and their offices have done. Laboring under the severe handicap of having to overhaul the entire machinery of military justice in the midst of the Korean War,⁵⁷ the military legal branches are doing a good job. For example, large-scale educational programs have been conducted, including even the production of motion pictures on military justice.⁵⁸

49. *Id.* at 4.

50. See Keefe and Moskin, *supra* note 38, at 157; Blake, *Punishment Aspects of a Bad Conduct Discharge*, J.A.G. J. 5 (Dec. 1952).

51. For example, no law officer is required on a special court-martial, and legally trained personnel are not absolutely required therein. UNIFORM CODE OF MILITARY JUSTICE, Arts. 26, 27, 64 STAT. 117, 50 U.S.C.A. §§ 590, 591 (Supp. 1951).

52. The Navy and Coast Guard wish to continue in their services the power of special courts to award bad conduct discharges. Report, *supra* note 47, at 5. Special problems of the seagoing forces may well justify this view. See Ward, *VCMJ—Does It Work?*, 6 VAND. L. REV. 186, 211-16 (1953).

53. *Id.* at 10.

54. *Id.* at 18.

55. *Ibid.* The shortage is especially acute in overseas commands.

56. Chief Judge Quinn is of the view that, "the services have made excellent progress in improving the caliber of court-martial trials and in carrying out the spirit of the Uniform Code of Military Justice." Personal communication to one of the authors, September 11, 1952.

57. Admiral Nunn points out that, "the need for implementing the Uniform Code of Military Justice arose almost simultaneously with the outbreak of hostilities in Korea. This circumstance created some difficulty in the transition to the procedures of the Code, but gave us an excellent opportunity to observe the workings of this new statute relative to combat forces in the field. I believe we have learned a lot in the past fifteen months the Code has been in operation that will help us to maintain the high standards in the administration of justice expected in the armed services." Personal communication to one of the authors, September 9, 1952.

58. REPORT, *supra* note 47, at 10-11, 17-18, 23-5, 29-30, 35.

However, despite the substantive improvements which the Uniform Code makes in military justice, and the diligence of the services in implementing these improvements, the basic question still remains: has the Code gone far enough in achieving reform?

It may well be argued that it has not, particularly on the vital question of "command control." The commanding officer in his role as convening authority still appoints the members of the court, the law officer, the trial counsel, and the defense counsel, and in his position as reviewing authority still passes on the findings and sentence. Although practically all of the civilians who served on the various reform committees, and many military men, recommended that such functions, or at least a large part of them, be taken away from the commanding officer, nothing has been done on that score.

Of course the Code, in a fashion somewhat stronger than the former law,⁵⁹ does prohibit the convening authority from influencing a court-martial,⁶⁰ but the effectiveness of this provision is highly questionable. A commanding officer's influence will not be exercised in an obvious and clearly bad-intentioned way. If exercised at all, it will be exercised subtly and in the honest, though mistaken belief, that the cause of justice is being promoted. Under such circumstances it is very doubtful if a subordinate officer would be inclined to prefer charges against his superior for violation of the influence prohibition. The only effective way to eliminate "command control" is to entirely remove the appointment and review functions of the commanding officer, at least in general court-martial cases.⁶¹

What seems to be another defect in the Code, but one of much less consequence, is the continuation of a separate Judge Advocate General's office, or its equivalent, for each arm of the service.⁶² Under a so-called "Uniform" Code it would seem that the offices of the Judge Advocates

59. Art. of War 88, 62 STAT. 639, 10 U.S.C.A. § 1560 (Supp. 1950).

60. UNIFORM CODE OF MILITARY JUSTICE, Art. 37, 64 STAT. 120, 50 U.S.C.A. § 612 (Supp. 1951).

61. See the suggestions in Re, *supra* note 42, at 177-8; Spindler, *supra* note 42, at 1085-6, and Keeffe and Moskin, *supra* note 38, at 158-9. It is interesting to note that Captain Ward concludes that "command control" has been "abolished" under the Code. *VSMJ—Does It Work?* 6 VAND. L. REV. 186, 224 (1953). He gives a good deal of logical evidence to support this conclusion, the evidence being drawn from experience in the District Legal Office, 12th Naval District. Captain Ward's excellent article is not unpersuasive, but the present authors do not wholly share his optimistic view. Compare Captain Ward's observations with the much more cautious ones of the Code's principal draftsman. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 183-85 (1953).

62. UNIFORM CODE OF MILITARY JUSTICE, Art. 1, 64 STAT. 108, 50 U.S.C.A. § 551 (Supp. 1951).

General should be merged, at least on the upper echelons, in order to insure uniformity in procedures, as well as perhaps promote economy of operation.⁶³ This is not said by way of criticism of the existing offices of the Judge Advocates General. These organizations have done a commendable job all along the line, and very few of the deficiencies in the military justice system can be laid at their doors. But the good job they are doing could, it would appear, be done even better through a merger of their facilities. Of course, it may be that this problem is merely part of the overall question of unification of the armed forces generally, and that complete legal integration should await more complete unification on the larger scene. But it is at least time to give some mature thought to the issue.

Criticism has also been directed at the method of appellate review under the Code, especially in regard to the Court of Military Appeals.⁶⁴ Aside from the cases in which the sentence affects a general or flag officer or extends to death, review can be had only where a Judge Advocate General orders the case forwarded or the accused petitions the Court of Military Appeals for review.⁶⁵ Since the majority of accused persons are likely to be of poor background and unlearned in legal procedure, the net result may be that in some meritorious cases petitions for review are never filed. Extension of mandatory review seems indicated. Specific proposals for such extension will, however, have to await further experience under the Uniform Code.⁶⁶

DECISIONS BY THE COURT OF MILITARY APPEALS

How much reform the Uniform Code achieves naturally will depend a great deal upon how it is administered, and a most important role in that administration is played by the Court of Military Appeals. That tribunal heard its first case in September, 1951, and a sufficient number of decisions have been rendered to provide at least some insight into its attitudes.

It may be categorically stated that the Court has done a thoroughly commendable job. It seems determined to equate military and civilian justice as far as possible. Time after time its opinions refer to this

63. See Keeffe and Moskin, *supra* note 38, at 151-2.

64. See Keeffe and Moskin, *supra* note 38, at 163-4.

65. UNIFORM CODE OF MILITARY JUSTICE, Art. 67, 64 STAT. 129, 50 U.S.C.A. § 654 (Supp. 1951).

66. Other possible defects in the Code are set out in Keeffe and Moskin, *supra* note 38. The present writers are not in agreement with Keeffe and Moskin on their general condemnation of the Code. Nonetheless their article makes many thoughtful observations and is definitely "required reading" for those concerned with improvements in court-martial procedures.

as the objective of the Code, and cite federal and state decisions as authorities. On numerous occasions it has reversed for prejudicial error even in the absence of record objections by defense counsel—something which is relatively rare in civilian criminal courts. One is impressed also with the combined scholarly and practical character of the court's opinions.⁶⁷ The high caliber of the opinions is particularly remarkable since the court has only three members and disposes of a very heavy volume of litigation.

Possibly the most important holding to date is *United States v. Clay*,⁶⁸ which decided that a failure to instruct on the presumption of innocence and the burden of proof, as required by the Code⁶⁹ and the Manual for Courts-Martial,⁷⁰ was reversible error in a case where the accused pleaded not guilty.⁷¹ The Court of Military Appeals, emphasizing that the Uniform Code was designed to place military justice as far as possible on the same plane as civilian justice, established in that case the concept of "military due process" which includes the basic procedural rights granted by Congress to the accused.⁷² Just as a denial of *constitutional* rights will constitute a deprivation of civilian due process in a civilian court, so a denial of basic *statutory* rights in a military court will deprive

67. A good illustration of the practical approach is *U.S. v. Reeves*, No. 453, USMA (1952), where the court held that a board of review could reconsider a decision on petition of the accused, commenting that it seems "to make good sense for a board to give consideration to correcting any prejudicial error in a sentence while the cause is still in its lap." A handy reference to the points of law decided by the court thus far is the *Synopsis of Military Appeals Cases* in 7 U. OF MIAMI L.Q. 215 (1953).

68. 1 CMR 74 (1951); noted in JAG JOURNAL 2 (March 1952).

69. UNIFORM CODE OF MILITARY JUSTICE, Art. 51, 64 STAT. 124, 50 U.S.C.A. § 626 (Supp. 1951).

70. ¶ 73 (b).

71. *Cf. United States v. Lucas*, 1 CMR 19 (1951) (similar error not reversible because no material prejudice where accused had already pleaded guilty; plea took question of innocence or guilt out of the case).

72. The court suggested these as some of the rights of military due process: "To be informed of the charges against him; to cross-examine witnesses for the government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review." In a provocative article Colonel Wurfel has characterized the phrase "military due process" as an "unhelpful catchphrase . . . of nebulous meaning." *"Military Due Process": What Is It?*, 6 VAND. L. REV. 251, 286 (1953) while there is much to be said for Col. Wurfel's viewpoint, the present authors do not believe that the phrase is so lacking in content as he contends.

an accused of military due process. Moreover, in marking out the bounds of military due process, cases from the civilian courts are to be helpful guides.⁷³

Although the *Clay* decision has been criticized,⁷⁴ it represents, in our opinion, a bold, courageous, and noteworthy achievement.⁷⁵ In substance it transplants to military law all the rights afforded by civilian due process which have a counterpart in the Uniform Code.⁷⁶ In these trying times, when, in some sense, at least, every civilian is a soldier, every soldier should be a civilian so far as basic rights are concerned. Our experience with the administrators of the legal branches of the armed forces has convinced us that they are just as much concerned with protecting the rights of accused persons as are civilian judges, and we are sure that they welcome decisions such as *Clay* which aid in that objective.

Another important holding which has generated some discussion is *United States v. Monge*.⁷⁷ In that case, the first one before the court involving the voluntariness of confessions, a confession of theft was obtained while accused, an 18-year old Army private of below average intelligence, had a bayonet at his back. The self-incrimination warning required by the Code was not given.⁷⁸ Eleven hours later the soldier was interrogated further, and this time the required warning was given. He again admitted his guilt, and, four days later, after the same warning, made a similar confession. Based on these later confessions, he was convicted, and the conviction affirmed by the Court of Military Appeals. That tribunal accepted the factual finding of the court-martial that the effect of any prior coercion had worn off.

The case has been criticized on the basis that the high court accepted too readily the findings of the court-martial and did not make the more independent inquiry that the Supreme Court of the United States is inclined to pursue in such cases.⁷⁹ There is something to be said for this criticism.⁸⁰ However, even those who may disagree with this par-

73. "Previously adjudicated federal court cases are a source from which we can test the prejudicial effect of denying an accused the rights we have set out as our pattern of 'military due process.'" 1 USCMA at 78.

74. Note, 20 GEO. WASH. L. REV. 490 (1952). The note maintains that the error was not materially prejudicial.

75. See Note, 27 N. Y. U. L. REV. 163 (1952).

76. Spindler, *supra* note 42 at 1091.

77. 2 CMR 1 (1952).

78. UNIFORM CODE OF MILITARY JUSTICE, Art. 31, 64 STAT. 118, 50 U.S.C.A. § 602 (Supp. 1951).

79. Note, 5 VAND. L. REV. 640 (1952). *Watts v. Indiana*, 338 U.S. 49 (1949) and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) are illustrative of the Supreme Court's inquiry.

80. In *United States v. Webb*, 2 CMR 125 (1952) the court formulated a test as

ticular decision would seem to have no cause for serious alarm, for Chief Judge Quinn pointed out that the principles applied in non-military courts are equally applicable to military justice, and that a confession induced by hope or fear is just as untrustworthy in a court-martial as in a civilian court. Indeed, he went so far as to say that the very existence of military discipline gives cause for additional suspicion towards confessions made in the presence of military superiors. In view of these statements, it is likely that the Court of Military Appeals in confession cases will not differ fundamentally from civilian courts in its approach.

It is somewhat premature to speak of general trends in the decisions of the Court of Military Appeals since experience thus far is limited. But, tentatively at least, it may be observed that the court is more concerned (and properly so) with prejudice to the accused than with technical propositions of law. Thus it has frequently affirmed, in the face of admitted or assumed errors,⁸¹ on the authority of Article 59 of the Code, which provides in part that, "A finding or sentence of a court-martial

to review of a confession's admissibility. If the law officer could conclude within the operation of a reasonable mind that the confession was voluntarily made, the court must accept his conclusion; that is, the resolution of the question below must be accepted when supported by substantial evidence even if the members of the court as individuals might resolve the controverted facts otherwise or draw different inferences therefrom.

It may be recalled that Keeffe and Moskin referred to the limitation of review to questions of law (CODE OF MILITARY JUSTICE, Art. 67, 64 STAT. 129, 50 U.S.C.A. § 654 (Supp. 1951)) as a defect in the review procedure of the Court of Military Appeals, and urged that the court have power to reweigh the evidence. *Supra* note 38, at 164. Their statement that, "Not even busy civil courts are limited to a review of the law in criminal cases", would seem to be erroneous, however. For it they cite *People ex rel. Higley v. Millspaw*, 281 N.Y. 441, 24 N.E.2d 117 (1939), which was not a criminal case but a habeas corpus proceeding to which the Civil Practice Act applies. The New York Court of Appeals does not review the facts in criminal cases except in first degree murder convictions where the sentence is of death. Virtually none of the state highest courts pass on fact questions in criminal cases. Therefore, the Court of Military Appeals is in this respect merely following traditional practice.

81. See, e.g., *United States v. Gordon*, No. 424, USCMA (1952); noted in JAG JOURNAL 2 (June 1952) (non-commissioned warrant officer appointed trial counsel instead of commissioned officer); *United States v. Lee*, 2 CMR 118 (1952); noted in JAG JOURNAL (May 1952) (trial counsel conducted informal preliminary investigation and signed charges as accuser); *United States v. Bound*, 2 CMR 130 (1952); noted in JAG JOURNAL 18 (May 1952) (member was security watch when offense committed and informally investigated it; held not prejudicial as to findings, but prejudicial as to sentence); and *United States v. Lucas*, 1 CMR 19 (1951) (president failed, in case where accused pleaded guilty, to instruct on presumption of innocence, elements of offense, reasonable doubt, and burden of proof); *United States v. Goodrich*, 1 CMR 26 (1951) (president failed, in case where accused pleaded guilty, to take secret written ballot on guilt). See Nesbitt, *Harmless Error*, JAG JOURNAL 13 (March 1952).

shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.⁸² On the other hand, it has quite often reversed where prejudice was found even in the absence of proper objection by defense counsel.⁸³ In taking cognizance of points not properly raised below, the court has been more lenient towards accused persons than civilian appellate tribunals generally are. This does not mean, however, that defense counsel can afford to be lax in his duties in a court-martial trial. Where minor errors are concerned, the court has not hesitated to find a waiver from the failure to object.⁸⁴

Finally, it may be stated that the court has no qualms about using plain speech to "tell off" the military authorities in the rare case where such action seems indicated. Thus in one case a Navy board of review had affirmed a conviction with the notation that accused had pleaded guilty to a charge of theft.⁸⁵ After pointing out that the record was "perfectly clear" that accused had pleaded not guilty, the court loosed a *per curiam* blast at the board of review and the court-martial:

"We are unable to understand this action. . . . There is little excuse for such obvious errors on the part of an appellate reviewing agency where the liberty and reputation of one convicted of a serious crime is at stake.

"This record, even aside from the action of the board of review, demonstrates a disregard for procedures required by the Uniform Code of Military Justice and the Manual for Courts-Martial, 1951.

". . .

82. 64 STAT. 127, 50 U.S.C.A. § 646 (Supp. 1951). The Court has said: ". . . an appellate court is not and should not be concerned with emphasizing procedural errors to the point where an otherwise guilty defendant is permitted to escape the penalties properly exacted by society for his offenses." *United States v. Doyle*, No. 265, USCMA (1952).

83. See e.g., *United States v. Carter*, 2 CMR 14 (1952); noted in *JAG JOURNAL* 20 (Feb. 1952) (unsworn statement of trial counsel accepted as proof of prior convictions); *United States v. Zimmerman*, 2 CMR 66 (1952); noted in *JAG JOURNAL* 15 (June 1952) (similar to *Carter* case); *United States v. Rhoden*, 2 CMR 99 (1952) (incomplete instruction); and *United States v. Williams*, 2 CMR 92 (1952) (erroneous instruction). See, for discussion of the *Carter* and *Zimmerman* cases, Milota, *Previous Convictions*, *JAG JOURNAL* 15 (June 1952).

84. *United States v. May*, 2 CMR 80 (1952); noted in *JAG JOURNAL* 2 (April 1952) (failure of accuser to swear to charges); *United States v. Marcy*, 2 CMR 82 (1952) (similar to *May* case); and *United States v. Castillo*, No. 449, USCMA (1952); noted in *JAG JOURNAL* 2 (July 1952) (improper proof of previous convictions). The Court has said that generally errors in admitting evidence will not be considered if not objected to, where it appears that the defense understood its right to object, unless necessary to avoid "manifest miscarriage of justice". *United States v. Masusock*, 1 CMR 32 (1951). On the importance of objections, see Van Wolkentou, *Defense Techniques in the Preparation and Trial of Courts-Martial*, *JAG JOURNAL* 3 (May 1952).

85. *United States v. James*, No. 551, USCMA (1952).

"It is not this Court alone that is endowed by Congress with responsibility for insuring that courts-martial are conducted in accordance with required procedures. The reforms intended by the Uniform Code of Military Justice will not be carried out until officers concerned with ordering, conducting and reviewing courts-martial observe scrupulously their duties and responsibilities under the Code and the Manual. This case falls far short of meeting the required standards."

JUDICIAL REVIEW OF COURTS-MARTIAL

At first glance it might seem that federal courts have no power to review courts-martial. Thus Article 76 of the Uniform Code makes the findings and sentences of such tribunals "final and conclusive," and "binding upon all departments, courts, agencies and officers of the United States. . . ." ⁸⁶ This statutory provision is, however, at least limited by the United States Constitution which ordains that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." ⁸⁷ In a recent case ⁸⁸ the Supreme Court construed language in the Articles of War which was very similar to the language of Article 76 as doing no more than describing the "terminal point" for proceedings *within* the court-martial system. Said the Court:

"If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable." ⁸⁹

Therefore, the federal courts today have jurisdiction, just as they always have had, ⁹⁰ to test the legality of a detention under court-martial order. ⁹¹ This review in habeas corpus is, however, a very limited one. It is certainly not as broad as an appellate court's review of a trial court, and is not even as broad as a court's review of an administrative

86. 64 STAT. 132, 50 U.S.C.A. § 663 (Supp. 1951).

87. Art. 1, § 9.

88. *Gusik v. Schilder*, 340 U.S. 128 (1950). See Pasley, *Federal Courts Look at the Court-Martial*, 12 U. OF PITT. L. REV. 33, 34 (1950); Wiener, *The New Articles of War*, INFANTRY J. 24, 29 (Sept. 1948).

89. The legislative history of the Uniform Code clearly shows that Article 76 is not intended to oust the federal courts of habeas corpus jurisdiction. SEN. REP. No. 486, 81st Cong., 2d Sess. (1949); U.S. CODE CONG. SERV. 2222, 2258 (1950).

90. See *e.g.*, *Wise v. Withers*, 3 Cranch 331 (U.S. 1806); *Houston v. Moore*, 5 Wheat. 1 (U.S. 1820); *Martin v. Mott*, 12 Wheat. 19 (U.S. 1827); *Dynes v. Hoover*, 20 How. 65 (U.S. 1857).

91. Another possible, but less important, mode of collateral attack on a court-martial proceeding is the suit for back pay. See *e.g.*, *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Claims 1947); *United States v. Brown*, 206 U.S. 240 (1907); and *Runkle v. United States*, 122 U.S. 543 (1887).

agency's decision where the question is whether there is substantial evidence to sustain the quasi-judicial determination.⁹² In habeas corpus the question is not guilt or innocence, preponderance of evidence, substantial evidence, or even legal error or correctness. "The single inquiry, the test, is jurisdiction."⁹³

But "jurisdiction," like so many words in the lawyer's vocabulary, is a word of ambiguous reference. It means many things to many men. Historically, so far as courts-martial are concerned, the jurisdictional questions have been whether the court-martial was properly constituted,⁹⁴ whether it had authority over the accused,⁹⁵ whether it had the right to try the crime charged,⁹⁶ and whether it exceeded its power in awarding sentence.⁹⁷

During the past decade there have been two vaguely discernible tendencies in defining jurisdictional matters on habeas corpus review of military tribunals. One has been the apparent tendency of the Supreme Court to stick rather steadfastly to traditional notions of jurisdiction in habeas corpus (something which it has not done in civilian cases), and the other is the tendency of the lower federal courts to expand jurisdictional concepts in an evident effort to give greater protection to the serviceman.

Thus, examination of recent Supreme Court decisions shows that a serviceman rarely succeeds in convincing that bench that the court-martial which tried him lacked jurisdiction. In *Humphrey v. Smith*,⁹⁸ for example, the Supreme Court held that failure to conduct a pre-trial investigation in the manner prescribed by the 70th Article of War did not deprive an Army general court-martial of jurisdiction. That Article provided that, "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made," but the highest bench regarded failure to comply as not vitiating the trial proceeding. The Court regarded the fact that Congress had not required analogous pre-trial procedures for Navy courts-martial as an indication that an improper investigation was not important enough to constitute a jurisdictional defect.

92. Cf. Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 MO. L. REV. 147 (1949).

93. Justice Clark in *Hiatt v. Brown*, 339 U.S. 103, 111 (1950), quoting from *In re Grimley*, 137 U.S. 147, 150 (1890). See, generally, Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 699 (1951); Snedeker, *Habeas Corpus and Court Martial Prisoners*, 6 VAND. L. REV. 288 (1953).

94. *United States v. Smith*, 197 U.S. 386 (1905).

95. *Ex parte Reed*, 100 U.S. 13 (1879).

96. *Dynes v. Hoover*, 20 How. 65 (U.S. 1857).

97. *Ex parte Mason*, 105 U.S. 696 (1881).

98. 336 U.S. 695 (1949).

In another case⁹⁹ it appeared that a soldier was tried by a general court-martial of a Third Army division which was advancing rapidly into Germany. The court-martial heard evidence and arguments of counsel, and then continued the case in order to hear civilian witnesses not then available. Subsequently the Commanding General of the Third Army transferred the proceeding to the Fifteenth Army for trial on the ground that the tactical situation and the distance from witnesses made it impracticable for the Third Army to conduct the court-martial. It was decided that the soldier was not put in double jeopardy by a trial by the Fifteenth Army, since the necessity of the situation required the discontinuance of the first trial.¹⁰⁰ The Court in this case gave a very broad interpretation to the well-recognized "necessity" principle in order to reach its conclusion that the soldier did not suffer double jeopardy.

In *Hiatt v. Brown*¹⁰¹ a general court-martial was convened containing only one officer from the Judge Advocate General's Department. This officer was designated as an *assistant trial judge advocate*, and even he was absent from the trial on verbal orders of the convening officer. At the time of the trial, in 1947, the 8th Article of War required the authority appointing a general court-martial to detail *as law member* an officer of the Judge Advocate General's Department except when one was "not available for the purpose." The Court held that the availability of such an officer as law member was a matter within the sound discretion of the appointing authority, and that the record disclosed no abuse of such discretion. By so holding, the Court conferred upon commanding officers an almost limitless discretion, and deprived the 8th Article of any real effectiveness. In that case the Supreme Court also commented that it was error for the Court of Appeals to extend its review for the purpose of determining compliance with Constitutional due process to such matters as the inadequacy of the pre-trial investigation and the incompetence of the law member and the defense counsel. To say the least, the wisdom of the Supreme Court's views in this regard would seem to be open to much question.

The main point in another case was whether a court-martial was deprived of jurisdiction by reason of the treatment of the insanity issue.¹⁰²

99. *Wade v. Hunter*, 336 U.S. 684 (1949).

100. Inasmuch as the Supreme Court found no double jeopardy, it did not have to consider another problem, namely, if the court-martial improperly overruled the plea of former jeopardy, was such an error subject to collateral attack on habeas corpus? See, on this point, Thornton, *Double Jeopardy and the Court-Martial*, 19 *BROOKLYN L. REV.* 74 (Dec. 1952).

101. See note 44 *supra*.

102. *Whelchel v. McDonald*, 340 U.S. 122 (1950).

The Court held that it was not upon a showing that the investigating officer, a neuropsychiatrist attached to the prisoner's division, the division staff Judge Advocate, the reviewing authority, and the Judge Advocate General all gave consideration to the question, although the defense of insanity was not raised on the trial. With the result in this particular case there can be little quarrel, though the language of the opinion seems unnecessarily broad.

The problem of exhaustion of administrative remedies was passed upon in a decision which ruled that a petition for habeas corpus should not be entertained until the prisoner applied to the Judge Advocate General for a new trial pursuant to Article 53 of the Articles of War.¹⁰³ It was so held even though the petition for habeas corpus was filed prior to the effective date of the Article and the prisoner had exhausted the previously existing administrative remedies.

Of course, it may be mere coincidence that the Supreme Court ruled against the complaining serviceman in all the foregoing cases. It may be that if analogous issues had been presented in civilian cases the results would have been the same. Yet though chance may be the explanation, it is rather hard to reconcile the strict interpretation of jurisdictional matters in these military cases with the Court's construction of "jurisdiction" when civilians bring habeas corpus.

There is a good deal of evidence, which need not be detailed here, to support the thesis that the Supreme Court has tended during the past decade or so to broaden the scope of review on habeas corpus in civilian decisions involving constitutional issues.¹⁰⁴ As appears from the military cases previously discussed, it is questionable whether this broadening also extends to prisoners in the armed services.¹⁰⁵ While

103. *Gusik v. Schilder*, 340 U.S. 128 (1950). After exhausting his administrative remedy Gusik did obtain a hearing on the merits in the habeas corpus proceeding. He was, however, unsuccessful. *Schilder v. Gusik*, 195 F. 2d 657 (6th Cir. 1952).

104. See *Johnson v. Zerbst*, 304 U.S. 458 (1938) (court's jurisdiction, which existed at beginning of trial, "lost" by failure to provide counsel for accused; Supreme Court stated that the scope of inquiry in habeas corpus has been broadened); *Waley v. Johnson*, 316 U.S. 101 (1942) (coerced plea of guilty; Supreme Court declared that, "the use of the writ [of habeas corpus] in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."); *Hawk v. Olson*, 326 U.S. 271 (1945) (no effective assistance of counsel); *Smith v. O'Grady*, 312 U.S. 329 (1941) (defendant tricked into pleading guilty).

105. Prof. Re comments that, "It cannot be said that the attitude inherent in some lower federal court cases, which deems additional matters jurisdictional, has been approved by the United States Supreme Court. . . . However, in reversing the Court of

there would seem to be no *logical* reason why a serviceman should have less protection on habeas corpus than his civilian brother,¹⁰⁶ it may be that the Supreme Court decisions stand for this proposition.

Be that as it may, it is clear that the lower federal courts have striven to broaden habeas corpus review in military cases as well as in civilian ones. The decisions establishing this trend have been thoroughly discussed elsewhere,¹⁰⁷ and only passing reference will be made to them.

In *Schita v. King*,¹⁰⁸ the Eighth Circuit held that a petition for habeas corpus stated allegations which, if true, showed a violation of due process in a court-martial trial, and entitled petitioner to his release. These allegations, it will be observed, did not relate to matters traditionally deemed to affect the jurisdiction of courts-martial, but rather were directed to a showing of a generally unfair trial. Such allegations were in substance that petitioner had been denied military counsel of his choice, represented by unprepared civilian counsel, deprived of the right to call and confront witnesses, convicted on unsworn testimony, and denied an appeal. The Circuit Court so held in "view of the trend of modern decisions, particularly the decisions of the Supreme Court," this reference being to decisions in cases involving civilians.¹⁰⁹

The Ninth Circuit has perhaps intimated that its views as to fairness of military trials are similar to those of the Eighth Circuit,¹¹⁰ and the Third and Fifth Circuits have taken stands along the lines of the *Schita* case.¹¹¹ The attitude of these courts might be called the "due

Appeals decision in *Humphrey v. Smith*, [336 U.S. 695 (1949)] the Supreme Court indicated disapproval of the inceptive trend to broaden the traditional scope of judicial review in the court-martial cases." *Supra* note 49 at 166-7. Pasley seems to take a similar view. *Supra* note 88, at 33.

106. Indeed should he not, if anything, have more protection since his original trial has been in a somewhat more summary tribunal?

107. Pasley, *supra* note 88.

108. 133 F. 2d 283 (8th Cir. 1943). See the later history of the case in *Schita v. Cox*, 139 F. 2d 971 (8th Cir. 1944), *cert. den. sub. nom.*, *Schita v. Pescor*, 322 U.S. 761 (1944), *rehearing den.* 323 U.S. 810 (1944), and see also, Note, 21 GEO. WASH. L. REV. 492 (1953).

109. Citing *inter alia* *Walker v. Johnston*, 312 U.S. 275 (1941); *Chambers v. State of Florida*, 309 U.S. 227 (1940); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Smith v. O'Grady*, 312 U.S. 329 (1941); and *Waley v. Johnston*, 316 U.S. 101 (1942).

110. *Romero v. Squier*, 133 F. 2d 528 (9th Cir. 1943), *cert. den.*, 318 U.S. 785 (1943).

111. *Innes v. Hiatt*, 141 F. 2d 664 (3d Cir. 1944); *Hiatt v. Brown*, 175 F. 2d 273 (5th Cir. 1949), *rev'd*, 339 U.S. 103 (1950). In reversing, the Supreme Court did not expressly reject or accept the due process test in court-martial cases. However, at least one authority is of the view that the decision is a "strong implication" that the Court has rejected such test. Pasley, *supra* note 88, at 32-3.

process" approach, as compared to the "jurisdictional"—or, in layman's language, the "hands-off"—approach reflected in the decisions of the Supreme Court heretofore discussed. Writing for the Third Circuit, Judge Maris gave a good illustration of this "due process" approach. After pointing out that the inquiry on habeas corpus is ordinarily concerned only with jurisdiction but has been extended in recent years to embrace cases where the conviction has been in disregard of constitutional rights, he stated:

"We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment to the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be. The guarantee of the fifth amendment that 'no person shall . . . be deprived of life, liberty or property, without due process of law,' makes no exception in the case of persons who are in the armed forces. . . . We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process. . . ."112

Several district courts have expressed much the same thoughts,¹¹³ as has the Court of Claims.¹¹⁴ Examination of these circuit and district court decisions indicates a straining by such courts to expand the scope of review and to include some of the concepts of civilian due process, apparently because of a distrust of the military system's ability to achieve just dispositions. The Supreme Court's attitude may demonstrate that it is not imbued with a similar distrust.

It will be interesting to observe in what direction the decisions under the Uniform Code will lean. If the Code has the effect of increasing the confidence of the courts in military justice—and, it may well do so, particularly in view of the splendid work of the Court of Military Appeals—it may be expected that the inquiry on habeas corpus will be held to "jurisdiction" and that that term will not be defined broadly. The present writers' preference is for expansion of habeas corpus review in military cases to the point where it coincides with the review in civilian decisions. So far as basic standards of fairness are concerned, the serviceman should stand on the same constitutional footing with his civilian brother.

112. 141 F. 2d 664, 666 (3d Cir. 1944).

113. *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946); *Beets v. Hunter*, 75 F. Supp. 825 (D. Kans. 1948), *rev'd on other grounds*, 180 F. 2d 101 (10th Cir. 1950), *cert. den.*, 338 U.S. 832 (1949), 339 U.S. 963 (1950).

114. *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Claims 1947).

JUDICIAL REVIEW OF MILITARY COMMISSIONS

There have been a relatively large number of decisions dealing with military commissions in recent years. These tribunals, like courts-martial, are military courts. Unlike courts-martial, they are ordinarily appointed to perform special trial functions and do not operate within the regular statutory framework which governs courts-martial. Their procedure is usually specially prescribed by the authority appointing them, and the rules of evidence applied are sometimes less stringent than in the case of courts-martial. On rare occasions such commissions have about them the aura of a political-judicial tribunal rather than an entirely judicial one. The trend in Supreme Court decisions concerning them has been in the direction of a "hands-off" policy similar to that applied to courts-martial.

*Ex Parte Quirin*¹¹⁵ was the only military commission case to come before the Supreme Court in World War II. Seven saboteurs, wearing German uniforms and carrying explosives and similar devices, were landed in 1942 from German submarines on the Eastern seaboard. They buried their uniforms and proceeded to various places in the United States. Soon after being captured, they were placed on trial in the District of Columbia before a military commission convened by the President of the United States, and were charged, among other things, with secretly passing in civilian dress through the military lines of the United States. It was held that this charge properly alleged an offense against the law of war which the President was authorized to have tried by military commission even though the civilian courts were open and functioning normally. The Court commented that it had always "recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."¹¹⁶ The *Quirin* case seems to be quite correct in its analysis of the jurisdiction of military commissions.

After the end of World War II, the trial by military commission of various enemy officials resulted in a number of Supreme Court cases. The highest Court in these cases adopted an attitude which resulted in a very narrow review of the actions of such tribunals. The decisions in the individual cases seem to have resulted in substantial justice, but some of the precedents established are of dubious character.

Shortly after the end of the war, *In re Yamashita*¹¹⁷ came before the

115. 317 U.S. 1 (1942).

116. *Id.* at 27-8.

117. 327 U.S. 1 (1946). To similar effect is *Homma v. Patterson*, 327 U.S. 759 (1946).

supreme bench. Yamashita, Japanese Military Governor of the Philippines and Commanding General there, was charged with violation of the law of war in failing to control the operations of the members of his command and permitting them to commit atrocities. He was tried before a military commission appointed by the Commanding General of the United States Army Forces, Western Pacific. The Supreme Court found that the commission was properly created to try violations of the law of war, even though actual hostilities had ceased; that the charge stated a violation of the law of war though it did not allege that Yamashita either committed or directed the commission of the atrocities; and that the admission into evidence of depositions, hearsay, and opinion evidence did not render the trial invalid. Trial procedure, ruled the Court, was for the military authorities to determine. Justice Murphy registered vigorous disagreement. In his view Yamashita was "rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged."¹¹⁸ Justice Rutledge too could not "believe in the face of this record that [Yamashita] has had the fair trial our Constitution and laws command."¹¹⁹

Another case involved high officials of the Japanese Government and officers of the Japanese Army who were found guilty of war crimes against humanity by the International Military Tribunal for the Far East. The Tribunal was set up by General MacArthur as the agent of the Allied Powers occupying Japan. The prisoners were actually in the custody of the Commanding General of the United States Eighth Army who held them pursuant to the orders of General MacArthur. The Supreme Court decided that the military tribunal in question was "not a tribunal of the United States," and that accordingly the courts of the United States had "no power or authority to review, to affirm, set aside or annul the judgments and sentences. . . ."¹²⁰ Justice Douglas, concurring, felt that this formula was "potentially dangerous" because it left "practically no room for judicial scrutiny of this new type of military tribunal which is evolving."¹²¹ Justice Douglas assumed that the Court could not review the judgment of an international tribunal as such, but he urged that its writ could run to a United States official if such official held a prisoner in unlawful custody. The Justice posed the problem of an American citizen tried by an international tribunal and asked if he would have any recourse to United States courts.

118. 327 U.S. at 27-8 (1946).

119. *Id.* at 42.

120. *Hirota v. MacArthur et al.*, 338 U.S. 197, 198 (1948).

121. *Id.* at 203-4.

Justice Douglas' views have much to commend them. It would appear that the Supreme Court unnecessarily circumscribed its scope of review in this case. As international society becomes more organized, international courts of one sort or another are likely to become more and more evident on the judicial scene. By limiting its review, the highest tribunal has perhaps given an unnecessarily free rein to the American military and civilian officials who may sit on such Courts in the future. Wherever in the world American officials administer justice, it would seem that they should be amenable to the review of United States civil courts.

In another case twenty-one German nationals in China were taken into custody by the United States Army after the Japanese surrender and were tried and convicted of violation of the laws of war by a United States Military Commission constituted by our Commanding General at Nanking, China. The prisoners were then repatriated to Germany to serve their sentences under control of the United States European Command. At no time were they within the ordinary territorial jurisdiction of any American civil court.

The Supreme Court held that the prisoners had no right to a writ of habeas corpus in a court of the United States.¹²² *Ex parte Quirin*¹²³ was distinguished on the basis that there the prisoners were in custody in the District of Columbia and were prosecuted for acts committed in the United States. In *re Yamashita*¹²⁴ was similarly distinguished because there the offenses were committed and the offender imprisoned in the Philippine Islands, an insular possession over which the United States then had sovereignty. Justice Black, joined by Justices Douglas and Burton, dissented. The dissenters felt that the Court was adopting a "broad and dangerous principle,"¹²⁵ and they argued for the proposition that habeas corpus jurisdiction can be exercised by our courts "whenever any United States official illegally imprisons any person in any land we govern."¹²⁶

Again the dissenting opinion would seem to set forth the preferable rule. Why should American military—or for that matter, civilian—officials be given *carte blanche* in conducting trials, merely because the accused persons have not set foot on American territory?

In an important Supreme Court decision on military commissions,¹²⁷

122. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

123. 317 U.S. 1 (1942).

124. 327 U.S. 1 (1946).

125. See note 122 *supra*, at 795.

126. *Id.* at 798.

127. *Madsen v. Kinsella*, 343 U.S. 341 (1952). See the related problem discussed in Brock, *Military Jurisdiction Over the "Civilian Component" of the Armed Forces*, JAG J. 9 (Dec. 1952).

it appeared that Yvette Madsen, a native-born American, resided in Germany with her husband, an Air Force Lieutenant. In 1950 the United States Court of the Allied High Commission for Germany convicted her of murdering her husband. After affirmance of the conviction by the Court of Appeals of the United States Courts of the Allied High Commission, Mrs. Madsen sought release in a habeas corpus proceeding brought in the United States District Court. The Supreme Court held that the occupation court, as a military commission or "common-law war court," had authority, derived from the President, to try her. The highest Court rejected her argument that certain amendments to the Articles of War extending the jurisdiction of courts-martial had deprived military commissions and similar tribunals of their powers. Justice Black dissented, expressing the view that "if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority."¹²⁸

The *Madsen* case is encouraging in that it shows the Supreme Court will scrutinize at least to some extent the actions of American military commissions and similar bodies where American citizens are concerned. It is to be regretted, however, that the Court has been so much less diligent in protecting non-citizens who are under American control.

While Justice Black's dissent in *Madsen* is not unimpressive, it is doubtful whether there is much authority to sustain his view. However desirable it may be, as a matter of policy, that American citizens in an occupied but thoroughly peaceful country be tried in courts created by Congress, it is hard to make a legal argument that such a procedure *must* be followed. That question is one which the policy-making officials of the executive and legislative branches of the Government must resolve, and is not for judges to determine.

The questions raised by the more widespread use abroad of military commissions and similar bodies have by no means all been answered. Indeed no great predictive vision is required to see that the myriad questions presented will increase rather than diminish in the next few years.

MARTIAL LAW

The legal effect of a declaration of martial law is a problem which rarely comes before the courts. Seldom in this peaceful country do national or community situations become so critical as to call for martial law. But World War II brought forth a grave emergency and a declaration of martial law in the Territory of Hawaii.

128. *Madsen v. Kinsella*, 343 U.S. 341, 372 (1952).

Immediately after the Japanese attack on Pearl Harbor the Governor of Hawaii suspended the privilege of the writ of habeas corpus and placed martial law in effect, pursuant to Section 67 of the Hawaiian Organic Act.¹²⁹ The Army Commanding General in Hawaii thereupon proclaimed himself Military Governor and established military "Provost Courts" to take the place of the civilian courts. The Supreme Court of the United States held, however, that Section 67 did not give the armed forces power to substitute military for judicial trials of civilians not charged with violations of the law of war at a time when the civilian courts were capable of functioning.¹³⁰ In a concurring opinion, Justice Murphy declared that "the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action."¹³¹

While necessarily somewhat *sui generis* and therefore difficult to fit into the stream of authority, the case is heartening in its final vindication of the principle of supremacy of civil power. This is not to say that the military officials in Hawaii are themselves to be condemned. Undoubtedly they acted in entire good faith and in accordance with what they regarded as the necessities of the situation. But illegal action, albeit in good faith, is no substitute for due process of law.¹³²

SUMMARY AND CONCLUSIONS

A decade ago the American system of military law was somewhat out of date and too much rooted in the past. During and after World War II it was criticized, among other things, for sometimes permitting the imposition of unduly harsh sentences, occasionally being subject to control of commanding officers, and often failing to use adequate numbers of legally trained personnel.

While much of this criticism may have been unwarranted, in the last analysis it had a good effect because born of it was the Uniform Code of Military Justice. The Code achieves substantial improvement in the military legal system. It provides an independent court of civilians as the top tribunal of the court-martial system, and insures that a law officer and adequately trained prosecution and defense counsel will ap-

129. 31 STAT. 141, 153.

130. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

131. *Id.* at 325.

132. See, generally, Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942); Houston, *Martial Law in Hawaii: A Defense of the War-Time Military Governor*, 36 A.B.A.J. 825 (1950); McCollock, *Now It Can Be Told: Judge Metzger and the Military*, 35 A.B.A.J. 365 (1949); Fixel, *Suspension of the Writ of Habeas Corpus in Hawaii Following Pearl Harbor*, JAG JOURNAL, BULL. No. 8, 42 (July 1951).

pear in all trials by general court-martial. Unfortunately the potential dangers of "command control" have not been eliminated. The commanding officer still appoints the members of the court, the law officer and the trial and defense counsel, and reviews the findings and sentence. Moreover, the method the Code provides for bringing appeals before the Court of Military Appeals may not be of the best. Yet, while the "reform" has not been as great as perhaps it could have been, military law is certainly moving in the right direction. The early decisions of the Court of Military Appeals reinforce this conclusion because they show that the Court is much concerned with the rights of servicemen and is striving to equate as far as possible "military due process" with civilian due process. The same may be said of the Judge Advocates General of the services, and their subordinates.

The law of judicial review of courts-martial has been going through a period of flux, with apparently opposing tendencies manifesting themselves in the Supreme Court and the lower federal courts. While the general picture is tinged with shadows which make analysis difficult, it seems that the Supreme Court is taking a narrow view of its habeas corpus jurisdiction where servicemen are concerned. This is in contrast with the broad view it takes in civilian cases. The lower federal courts, on the other hand, are applying the broad "due process" approach of the Supreme Court civilian decisions to military cases. The attitude of the lower federal courts seems preferable. Especially in an era such as this when large standing armies will be with us for many years to come, the constitutional protections of the serviceman should not be watered down by a niggardly application of habeas corpus jurisdiction.

The Supreme Court has also tended to limit sharply the review of judgments of military commissions, and has refused entirely to review the actions of such bodies where the tribunal is international in character or where the accused persons are aliens who have never come within American territory. This seems unfortunate. American political-military control seems destined to continue for a number of years in many areas of the globe, and at least the basic notions of American justice should follow the flag. When Americans, whether military men or civilians, administer justice abroad, civil courts of the United States should assert the power to see to it that this justice is in accordance with our country's ideals and traditions. Our system of law is one great mark of our democracy, and it should not be labeled "For domestic use only."

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EDITORIAL AND GENERAL OFFICES, 302 BROADWAY, NEW YORK 7, N. Y.

CONTRIBUTORS TO THIS ISSUE

FRANCIS X. CONWAY, A.B., 1930, Holy Cross College; LL.B., 1933, Fordham University. Lecturer in Law 1938-1950, Associate Professor of Law, 1950 to date, Fordham University School of Law. Member of the New York Bar. Author of *Damages for Shortened Life*, 10 FORD. L. REV. 219 (1941); *A State's Power of Defense Under the Constitution*, 11 FORD. L. REV. 169 (1942); *The New York Simultaneous Death Law*, 13 FORD. L. REV. 17 (1944).

HAROLD F. MCNIECE, B.S., 1944, LL.B., 1945, St. John's University; J.S.D., 1949, New York University. Instructor of Law, 1946-1948, Assistant Professor of Law, 1948-1950, Professor of Law, 1951 to date, St. John's University School of Law. Member of the New York Bar. Author of *CASES AND MATERIALS ON THE LAW OF TORTS* (1947); *CASES AND MATERIALS ON THE LAW OF SECURITY TRANSACTIONS* (1947).

JOHN V. THORNTON, B.S., 1944, St. John's University; LL.B., 1948, Yale Law School. Instructor in Law, 1950 to date, New York University School of Law. Member of New York Bar. Associate in Law, 1949-1950, Columbia University School of Law. Military Law Reporter for the Annual Survey of American Law. Author of many articles.

JOHN G. DUPONT, LL.B., 1926, Fordham University. Member of New York Bar. Contributor to N. Y. Law Journal.