

The Background and the Problem

Robert J. White

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

White, Robert J. (1961) "The Background and the Problem," *St. John's Law Review*: Vol. 35 : No. 2 , Article 1.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol35/iss2/1>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

St. John's Law Review

VOLUME XXXV

MAY 1961

NUMBER 2

THE UNIFORM CODE OF MILITARY JUSTICE — ITS PROMISE AND PERFORMANCE

(The First Decade: 1951-1961)

A SYMPOSIUM

THE BACKGROUND AND THE PROBLEM

REAR ADMIRAL ROBERT J. WHITE, CHC,
U.S. NAVY (RET.) †

STUDENTS of American history have written at length concerning certain distinctive characteristics of the American people which have produced unique and recurring phenomena in the fields of politics, economics, and sociology.

Comparatively little, however, has been written about the impact of the American character upon the over-all history of military discipline, and in particular about the unique and recurring phenomena in the public's reaction to military discipline during and after major foreign wars.

From abundant evidence, we may safely generalize and submit certain historical conclusions. The American people have been slow and reluctant to enter war. Despite the

† Former Dean, Catholic University Law School; Consultant, U.S. Navy; Senior Member, Board for the Study of Disciplinary Practices and Procedures of the United States Navy (1953); Author of *A STUDY OF FIVE HUNDRED NAVAL PRISONERS AND NAVAL JUSTICE* and *MOBILIZATION, MORALE, AND COMBAT SUCCESS IN THE UNITED STATES NAVY*.

problems posed in mobilizing a people accustomed to a wide latitude of freedom and traditionally opposed to regimentation of any kind, most citizens have responded willingly to a call for sacrifice. The nation has occasionally suffered humiliation through such incidents as the defections among some American prisoners in the Korean conflict. Yet in the overall experiences of foreign wars, American youths have proved themselves generous and courageous in their patriotism and have exhibited an outstanding capacity for adjustment and leadership.

Such united efforts of the military and civilian components have achieved great military success in hard fought wars. Yet, paradoxically, after achieving such victories, the American people, in a recurring pattern, have immediately demanded instant and precipitous demobilization which has seriously threatened military efficiency and discipline.

Finally, the American people, reacting to personal losses, continuous worry and strain, and disturbed by the complaints of returning servicemen, have lashed out indiscriminately at military authorities and have coupled their criticisms with vociferous and violent demands on Congress for investigations which would lead to basic reforms in the laws governing the administration of military discipline.

Such a phenomenon occurred after the American Revolution. It was repeated after World War I and again after World War II. In the early days of the Republic, such resentment culminated in efforts to reform military discipline and courts-martial through a Committee appointed to revise the Articles of War which governed Army discipline. The Committee included Thomas Jefferson and John Adams.¹

The American War Articles were borrowed from the British Articles, which in turn were almost a literal translation of the Roman Articles. The attempt to reform could hardly be called successful. Adams complained that Jefferson threw all the labor, including debate, on him, and the re-

¹ Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953). See also Address by E. M. Morgan before Maryland State Bar Association, 24 MD. STATE B. C. 195 (1919).

sulting legislation of 1806 re-enacted the Articles without substantial changes. A later attempt in 1874 accomplished little more, for eighty-seven of the one-hundred and one Articles remained unchanged and most of those remaining were not altered substantially. An eminent authority, Edmund M. Morgan, has characterized such military discipline as an attempt to subject an Army of citizens in uniform to a system designed "to fit an army of professional soldiers serving an empire for hire."² Though the Articles of War were again subjected to revision in 1916, the result was more a rearrangement and reclassification than a fundamental reform. Nor were the Articles for the Government of the Navy, based largely upon the British Articles, substantially changed—even in 1862 and subsequent thereto, the Articles remained fundamentally the same as the corresponding British Articles in theory and substance.³

Thus, at the outset of World War I, both the Army and Navy retained archaic systems of military justice poorly equipped for the stresses of military discipline of a huge conscript as well as volunteer military force in a large scale foreign war.

With victory over Germany achieved, the post-war pattern of American reaction soon became evident. Once again the public demanded, after World War I, a precipitous demobilization, and bitterly criticized the administration of military justice. Mounting public feeling culminated again in aggressive efforts for reform. Among the protagonists in the World War I controversy were John H. Wigmore, an eminent scholar in jurisprudence and the law of evidence, defending the military, and Edmund M. Morgan, then a young man, assuming the role of aggressive critic. It is noteworthy that Mr. Morgan, later a distinguished professor at Harvard Law School, served as the Chairman of the Committee appointed by the Department of Defense to draft the Uniform Code of Military Justice. The types of complaints after World War I

² Morgan Address, *supra* note 1, at 200.

³ Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

formed an example which was to recur in much more dramatic form after World War II. Such complaints assumed a standard pattern: unduly large numbers of men were court-martialed, with an extremely high percentage of convictions (88%); the award of sentences by courts-martial were excessive, resulting in the recommendations by Boards of Review of reductions in some 77% of the noted cases; wide discrepancies existed in sentences for the same offense (contemptuous language was punishable by three months confinement in England, and twenty-five years in France; common absence offenses varied from three months to ninety-nine years); tyrannical practices of courts-martial; the poor calibre of defense counsel; and, the most damning criticism of all, official increases in sentences on appeal. The storm of controversy subsided without effective reforms. Indeed, the practical results of these and later attempted reforms were far from significant, with the result that the system of military justice without modern reforms was grossly unprepared for the problems of discipline arising in the global war when the Army increased from 1,460,000 to 8,266,000, the Navy from 220,000 to 4,758,000, and the sum total of persons subject to military discipline totalled some 12,300,000. The total of military courts-martial approached some 600,000 per year at the height of World War II.

The astounding differences between prior wars and World War II in the numbers of men involved, the global spread in territory, the far-flung lines of various task forces, in some areas affected by low morals and strange mores, and the presence of a large number of youths already emancipated from old fashioned family and neighborhood influences and discipline—all were factors contributing to the vast increase of courts-martial and disciplinary problems in World War II, which resulted in about 1,700,000 courts-martial, over 100 capital executions, and the imprisonment, even at the end of the war, of some 45,000 servicemen.⁴

⁴ MacCormick, *Statistical Study of 24,000 Military Prisoners*, 10 FED. PROB. 6 (No. 2 1946); Karlen & Papper, *The Scope of Military Justice*, 43 J. CRIM. L., C. & P.S. 285 (1952); WHITE, *A STUDY OF FIVE HUNDRED NAVAL PRISONERS AND NAVAL JUSTICE* (1947).

Once victory had been achieved in World War II, the historic post-war pattern of the American Revolution and of World War I recurred in a demand for court-martial reform and a rising tide of criticism for the administration of military discipline. The huge numbers involved in World War II dwarfed by comparison the numbers involved in earlier wars, and appeared to increase the number of complaints in geometric progression. The emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system.

An understanding of this recurring historical pattern and of the number and variety of complaints after World War II is essential for any knowledge of the genesis of a universal code unique in the world's military history. For it is unique as an attempt to enact a fundamental law embracing for the first time all the military services, and dedicated to attempting a balance between the preservation of fundamental discipline as an indispensable basis of military efficiency and the maintenance of the legal rights of military personnel in a constitutional democracy emphasizing the dignity of the individual.

There may well be flaws in the Code which need correction. But to admit such a need does not postulate any tolerance of the extreme view that the Code should be liquidated, or in the alternative, so weakened, as to amount to a rejection of its historical necessity and fundamental philosophy.

It would appear that a major cause of the erroneous thinking of the latter school is a failure to understand and appraise the forces which led to the Code's enactment. Admittedly in that post-war era, there was a failure to understand the logistic demands upon military authority in a global war to enforce discipline and conduct courts-martial. Nor could an unprejudiced critic fail to recognize some exaggerated, vicious, and even untruthful complaints. Anyone familiar with the post-war period, including members of Congress who were deceived by false information, or, more often,

given only partial information, would agree with James Forrestal. When questioned about the pre-code functioning of military justice, he said, "I do not believe it is as bad as it has been painted, nor as good as some of its defenders claim. Many of the criticisms have seemed to me to be without foundation, but many of them have seemed to me to be justified."⁵

Even today, some extreme critics deny the historical need for the Uniform Code of Military Justice, minimize the complaints, and belittle its proponents. In this they betray a gross ignorance of American history and a culpable failure to understand the political necessities of public confidence in the fundamental fairness of courts-martial in our most critical period—not war, not peace—but in a period in which the national defense will need large numbers of young men in the military forces for an indefinite period.

Therefore, it becomes useful to review and to gauge again the numerous factors and forces which produced the Code. At the outset it will be necessary to separate fact from myth. For example, no myth has survived more successfully than the often repeated fiction that the Doolittle Board Army reforms of 1946 slackened discipline and "led to a revision of the Code of Military Justice [which was] a concession to civilian pressures. . . ."⁶ By an Army precept dated March 18, 1946, the Doolittle Board was directed to study officer-enlisted personnel relationships in the Army.⁷ The evidence included over a thousand letters as of April 30, 1946, witnesses in person, magazine and newspaper articles, and radio commentaries. The Board procedures appeared haphazard and uncritical, and the hearings provided a field day for violent critics of the officer-enlisted personnel relationship. The Board itself seemed to be intrigued with the field of "social behavior," where social distinctions imposed indignities upon enlisted personnel. The Board stressed that it was in

⁵ Index and Legislative History—Uniform Code of Military Justice.

⁶ Hanson N. Baldwin, *Saturday Evening Post*, Aug. 8, 1959, p. 13. Reprinted in condensed form, *Reader's Digest*, Jan. 1960, p. 96. See also *Saturday Evening Post*, July 30, 1955, p. 74; *Saturday Evening Post*, March 6, 1954, p. 64; *N. Y. Times*, Sept. 3, 1953, p. 23, col. 4.

⁷ The Doolittle Report, *Infantry Journal Press*, Washington, D. C., June 1946, p. 7.

this category that "abuses were most rampant, violations occurred most frequently, and irregularities were most apparent." To be sure, the Board did state that "the largest differential, which brought the most criticism in every instance, was in the field of military justice and courts-martial procedure which permitted inequities and injustices to enlisted personnel."⁸ Moreover the Board recommended a "review of the machinery for administering military justice and the courts-martial procedure with a view to making all military personnel subject to the same types of punishment as based upon infractions of rules and misdemeanors."⁹ It can readily be seen that this loose report centered upon social differences, fell far short of any comprehensive investigation, and was totally lacking in any specific recommendations for legislative reforms. To attribute a dominating influence to the Doolittle Report is to fall into the same error as the Board itself—a fascination with the reform of social amenities, salutes, and fraternization.

Conclusions contrasting in emphasis with those of the Doolittle Board were to be drawn by the Code Committee after months of study of a vast amount of evidence from a variety of sources using different approaches, whose only common denominator was an attitude deeply critical of the war-time administration of military discipline, coupled with an aggressive demand for a complete overhaul of the military judicial system. Primary sources included numerous studies hereinafter described, initiated by the armed services themselves from 1943 to 1947, large numbers of complaining letters to Congress and the White House, and numerous critical articles in service and veteran magazines, as well as special articles and editorials in newspapers including the New York Times and the Herald Tribune. Added to these were hundreds of printed pages of congressional hearings and debates.

Through convention resolutions from county to national level, the appointment of special committees, and the delegation of official spokesmen to congressional committee hear-

⁸ *Id.* at 18.

⁹ *Id.* at 21.

ings, legal associations and patriotic organizations threw their prestige and political influence behind the support of the controversial charges and the resulting demands for remedial legislation. Included in the former were the American Bar Association¹⁰ and special committees on military justice of the New York State Bar Association,¹¹ the War Veterans Bar Association,¹² and the New York County Lawyers Association.¹³ Included in the latter group were the American Legion,¹⁴ the Veterans of Foreign Wars,¹⁵ the Amvets,¹⁶ the National Guard Association,¹⁷ the Reserve Officers' Association,¹⁸ and the Marine Corps Reserve Association.¹⁹

In 1945, Army Under-Secretary Patterson had attempted to make comparisons favorable to the military courts-martial over civilian trials, particularly in the matter of review and clemency.²⁰ But the ground swell of criticisms alleging "caste," "discrimination," and "injustices" forced him to admit the need for "overhauling" the Army Court-Martial system in 1946.²¹ As Secretary, he appointed the ineffective Doolittle Board, and, shortly thereafter, the Vanderbilt Committee, headed by the vigorous former President of the American Bar Association, who was ably assisted by lawyers and judges of wide experience and recognized integrity. This Committee held advertised regional hearings culminating in over twenty-five hundred pages of transcript, examined voluminous Army disciplinary studies, considered several hundred pertinent questionnaires, and digested several hundred letters.²² While the Committee found that "the innocent are

¹⁰ *Hearings Before the Subcommittee of the House Committee on Armed Services*, H. R. REP. No. 2498, 81st Cong., 1st Sess. 715 (1949) [hereinafter cited as *1949 Hearings*]. See also *Changes Advised in Courts-Martial System*, 33 A.B.A.J. 40 (1947); *Improving Military Justice*, 33 A.B.A.J. 319 (1947).

¹¹ *1949 Hearings* 836.

¹² *Id.* at 646.

¹³ *Id.* at 633. N. Y. Times, July 14, 1947, p. 9, col. 1.

¹⁴ *1949 Hearings* 661, 662.

¹⁵ *Id.* at 734.

¹⁶ *Id.* at 776.

¹⁷ *Id.* at 771.

¹⁸ *Id.* at 831.

¹⁹ *Id.* at 699.

²⁰ N. Y. Times, July 8, 1945, p. 10, col. 6.

²¹ N. Y. Times, March 26, 1946, p. 31, col. 8.

²² Report of War Department Advisory Committee on Military Justice to

almost never convicted and the guilty seldom acquitted"—a conclusion generally admitted to be true—the Committee proceeded to indict the wartime administration of Army justice in several vital areas.

The Committee found a "definite pattern of defects" and concluded that the evidence justified these findings:

1. There was an absence of sufficient attention to and emphasis upon the military justice system, and lack of preliminary planning for it.
2. There was a serious deficiency of sufficiently qualified and trained men to act as members of the court or as officers of the court.
3. The command frequently dominated the courts in the rendition of their judgment.
4. Defense counsel were often ineffective because of (a) lack of experience and knowledge, or (b) lack of a vigorous defense attitude.
5. The sentences originally imposed were frequently excessively severe and sometimes fantastically so.
6. There was some discrimination between officers and enlisted men, both as to the bringing of charges and as to convictions and sentences.
7. Investigations, before referring cases to trial, were frequently inefficient or inadequate."²³

The Navy had recognized earlier the difficulties of the administration of justice in the war expansion. On June 25, 1943, the Secretary of the Navy requested Arthur A. Ballantine, a distinguished lawyer with wide governmental experience, to prepare a report on "the organization, methods, and procedure of Naval Courts—with recommendations of possible improvement—[in] handling the largely increased

the Secretary of War (1946). See also N. Y. Times, Dec. 22, 1946, p. 1, col. 4.

²³ Report of War Department, *supra* note 22, at 3.

volume of cases.”²⁴ Because the study was conducted during the active period of warfare, the report was necessarily limited in scope. The report dealt principally with procedures, but it also pointed out a “serious lack of standardization of punishment”²⁵ and criticized the practice of the excessive award of bad conduct discharges, though liberally remitted,²⁶ undue time lags between arrest and trial and later review,²⁷ and excessive sentences.²⁸

This last criticism was repeated in several later studies, the chief of which was a study of wartime discipline in the Navy by Vice Admiral Joseph K. Taussig.²⁹ Noting that in a review of 1600 courts-martial, the sentence had been substantially mitigated in some 1200, Admiral Taussig concluded:

“There is no doubt but that, under the system which we have followed for years, members of courts have generally been unwilling to undergo the risk of criticism based on supposed inadequacy of sentence which is inherent in attempting to fix a just and final measure of punishment. The result has been that courts usually impose excessively severe sentences which are mitigated with monotonous regularity.”³⁰ The First Ballantine Report also stressed the need for improving the legal qualifications of all those participating in the various phases of courts-martial, and recommended a review of the whole subject after the war ended.³¹

The Second Ballantine Report pursuant to precept of November 15, 1945, dealt largely with the procurement, qualification, and function of legal officers in the Navy. It admitted that wartime experience indicated a need for changes in the court-martial system.³² Such recommendations

²⁴ First Ballantine Report, U. S. Navy (1943).

²⁵ *Id.* at 13.

²⁶ *Id.* at 12.

²⁷ *Id.* at 7.

²⁸ *Id.* at 10.

²⁹ Naval War-Time Discipline, Report from United States Naval Institute Proceeding, July 1944, August 1944, October 1944.

³⁰ *Id.* at 5.

³¹ First Ballantine Report, U. S. Navy 5 (1943).

³² Second Ballantine Report, U. S. Navy 1 (1945).

included some reforms proposed in the report of Judge Mathew P. McGuire, a District of Columbia Federal Court Judge.³³

In addition to these general studies, the Navy made available special reports including the Keefe Board Review of general court-martial sentences,³⁴ the Snedeker Report, a comparative study of military disciplinary systems,³⁵ and the White Report, a study of "Five Hundred Naval Prisoners and Naval Justice," which revealed a common pattern of complaints and concluded with specific recommendations for the improvement of Naval Justice.³⁶ Rear Admiral O. S. Colclough, the Judge Advocate General of the Navy, announced that the Navy would modernize the basic laws for the government of the Navy and issue new rules for courts-martial. Included in such proposals were Review Boards with a civilian member, the division of duties between the Judge Advocate and the prosecuting (trial) counsel in a court-martial, protection of courts-martial from interference, and safeguards against unjust revocation of suspended sentence.³⁷

The investigations, studies, and Congressional Hearings of the post-war years dealing with such a comprehensive and complex problem as military justice patently demanded a calm, objective appraisal and a mature, constructive approach. Yet stormy petrels, including some members of Congress, stirred up bitterness with sensational headlines in the press. For example: "The Army has a rotten court-martial system but the Navy's is worse";³⁸ "Military Courts are guilty of the grossest types of miscarriage of justice";³⁹ "High Command accused of stacking courts against accused and refusing counsel of accused's choice";⁴⁰ "Marked discrepancy between justice to officers and enlisted men—a double stand-

³³ Report of McGuire Committee to the Secretary of the Navy (1945).

³⁴ Report of General Court-Martial Review Board (1947).

³⁵ Report of Colonel James N. Snedeker, USMC to Judge Advocate General (1946).

³⁶ WHITE, A STUDY OF FIVE HUNDRED NAVAL PRISONERS AND NAVAL JUSTICE (1947).

³⁷ N. Y. Times, June 22, 1947, p. 17, col. 1.

³⁸ Rep. L. M. Rivers, World Telegram, April 14, 1947.

³⁹ Sen. Wayne Morse, N. Y. Times, Nov. 7, 1945, p. 8, col. 4.

⁴⁰ Sen. William E. Jenner, N. Y. Times, July 9, 1947, p. 1, col. 7.

ard";⁴¹ "Denounces Army Gestapo training and alleged beatings."⁴²

The accuracy and fairness of such charges may be seriously questioned. But merely to deny or to question them does not in the slightest degree minimize the terrific adverse political impact of such charges on the public's confidence in military justice.

Undoubtedly, such charges contributed to the bitterness of the most controversial of all the questions relating to military courts-martial—"command control." In essence, "command control" refers to the power of the convening officer to appoint the members of the court, the law officer, the trial (prosecuting) counsel, and often the defense counsel. The convening authority also reviews the findings of the court-martial and has plenary power to cut down the punishment and suspend a bad-conduct discharge. Moreover, he passes upon the fitness reports of these officers and other incidental matters, such as leave.

A sharp controversy ensued between those who believed that Commanding Officers should be deprived of "command control" and those who viewed such prerogatives as essential to the orderly functioning of command. In the former group were the American Bar Association, the Vanderbilt Committee, the New York County Bar Association, and the Bar Association of the City of New York.⁴³ The New York State Bar Association, however, took an aggressive stand in favor of retaining "command control," and made much of General Eisenhower's opposition to a divided command responsibility.⁴⁴ That "command control" had been abused by interference in isolated cases could not be denied. The Vanderbilt Committee found a deliberate attempt to influence the decision in many instances.⁴⁵ A State Governor, later a Federal

⁴¹ Sen. M. R. Young, *N. Y. Times*, Sept. 20, 1946, p. 36, col. 3.

⁴² Rep. Leon H. Gavin, *N. Y. Times*, June 26, 1945, p. 20, col. 3.

⁴³ *N. Y. Times*, Aug. 17, 1947, § 4, p. 8, col. 7. See also Letter to Committee on Uniform Code, Nov. 2, 1948.

⁴⁴ Letter, Special Committee New York State Bar Association to Committee on Military Justice, Jan. 29, 1949, quoting Eisenhower speech, *New York Lawyer's Club*, Nov. 17, 1948. See also *N. Y. Times*, March 1, 1949.

⁴⁵ Vanderbilt Report, pp. 6-7, Dec. 13, 1946.

Judge, informed the Committee on the Code that he was dismissed as a member of a general court because of an acquittal, and threatened with a lower efficiency rating as an officer if he failed to convict in a greater number of cases.⁴⁶

The deep impact of the alleged abuses of "command control" is reflected in typical articles entitled "Can Military Trials Be Fair?,"⁴⁷ and "Drumhead Justice,"⁴⁸ as well as in newspaper accounts and editorials such as those of the New York Times and the New York Herald Tribune, which provided ammunition for the all-out attack upon "command control."⁴⁹ An amendment to deprive the convening officer of "command control" passed the House of Representatives on January 15, 1948, but failed to become law.

The Uniform Code has continued the retention of "command control." But it has placed a powerful proscription against abuse by Article 37,⁵⁰ which forbids any attempts to coerce or influence courts-martial, including any type of subsequent reprimand. Any violation subjects the offender to a court-martial under Article 98(2).⁵¹ In no area is the military in such a vulnerable position as in the abuse of "command control," for the American people instinctively strike out at any interference with the independence and integrity of a court of justice.

It is, of course, impossible to appraise accurately the many different factors which combined to bring about the enactment of the Code. Some extreme criticisms and allegations of abuse were hardly credible. But, on the other hand, an assertion that fundamental changes were not necessary ignored the accumulated evidence and the deep resent-

⁴⁶ Letter From Governor E. Gibson to the Committee on the Code, Nov. 18, 1948.

⁴⁷ 2 STAN. L. REV. 547 (1950).

⁴⁸ Reader's Digest, Aug. 1951, p. 39. See also Los Angeles Daily Journal, Jan. 29, Feb. 4, 1946.

⁴⁹ N. Y. Times, July 13, 1947, § 4, p. 8, col. 3; Feb. 9, 1949, p. 13, col. 1; Feb. 10, 1949, p. 26, col. 3; Sept. 8, 1949, p. 21, col. 3; May 8, 1950, p. 22, col. 3; N. Y. Herald Tribune, March 14, 1948; May 25, 1951. See also United States v. Littrice, 3 U.S.C.M.A. 487, 491, 13 C.M.R. 43, 47 (1953); Ward, *UCMJ—Does It Work?* 6 VAND. L. REV. 186, 199 (1953).

⁵⁰ UCMJ art. 37, 10 U.S.C. § 837 (1958).

⁵¹ UCMJ art. 98(2), 10 U.S.C. § 898(2) (1958).

ment voiced not only by the people in general, but by some conservative members of the Federal Judiciary. Since state courts lack jurisdiction, courts-martial decisions were attacked in the federal courts, usually by habeas corpus proceedings. The federal law had traditionally refused to revise the decisions of courts-martial, thereby narrowing the grounds of appellate review to a claim that the decision was void on account of an absolute want of power, rather than voidable because of the defective exercise of power.⁵²

No legal authority would deny that federal courts, enraged by flagrant abuses in some courts-martial, did in fact enlarge their jurisdiction to include collateral attack. A respected authority has warned that even the restoration by the Supreme Court of the narrower traditional rule and provisions of the Code itself will not prevent federal judges from assuming jurisdiction and reviewing any such flagrant abuses.⁵³

Out of the charges and denials, the extended hearings of committees in and out of Congress, the proposals of extremists criticizing and defending the military, and the multiple pressures of various legal and patriotic organizations, emerged a new fundamental law, unique in the world's history—a law which attempted to reconcile and balance the “justice element and the military element” in the American Constitutional Democracy.⁵⁴ In announcing the enactment of the law to become effective May 3, 1951, the Defense Department stated:

- (1) It creates a system of justice which is uniform for all the armed services;
- (2) It contains many new provisions designed to assure the accused a fair trial and to prevent undue control of or interference with the administration of justice;
- (3) It presents the basic military law in a well-organized, readily understandable form.⁵⁵

⁵² *Carter v. McClaghry*, 183 U.S. 365, 401 (1902).

⁵³ Pasley, *The Federal Courts Look at the Court-Martial*, 12 U. PITT. L. REV. 7 (1950).

⁵⁴ Brosman, *The Court: Freer than Most*, 6 VAND. L. REV. 166, 167 (1953).

⁵⁵ Department of Defense Press Release, May 5, 1950.

Such were the promises of this new and unique Uniform Code of Military Justice hammered out on the anvil of Congressional Hearings and debate into final legislation effective May 31, 1951. To implement such promises, the Code required, among other protections, that charges and specifications be signed under oath.⁵⁶ It forbade the questioning of a suspect without prior warning as to his right to refuse to answer,⁵⁷ limited the authority to pre-trial arrest or confinement,⁵⁸ and required "immediate steps" to inform and to try or dismiss the charges,⁵⁹ while, at the same time, providing against undue haste in the trial of the accused.⁶⁰

It also prohibited interference with the independence of the court-martial,⁶¹ and granted the right to challenge court members peremptorily as well as for cause.⁶² It stipulated the number of members on courts-martial,⁶³ and included the accused's right to enlisted members.⁶⁴ It further provided for the method of voting on guilt,⁶⁵ and set the effective date at which a sentence would begin to run.⁶⁶

Moreover, specific provisions protected the accused against double jeopardy,⁶⁷ provided a statute of limitations,⁶⁸ and banned unusual and cruel punishments.⁶⁹ In specific terms, the Code guaranteed the presumption of innocence⁷⁰ and placed the burden on the prosecution to prove guilt beyond reasonable doubt.⁷¹

Of equal importance with providing such substantive guarantees was the further necessity of insuring their im-

⁵⁶ UCMJ art. 30, 10 U.S.C. § 830 (1958).

⁵⁷ UCMJ art. 31, 10 U.S.C. § 831 (1958).

⁵⁸ UCMJ art. 9, 10 U.S.C. § 809 (1958); UCMJ art. 10, 10 U.S.C. § 810 (1958).

⁵⁹ UCMJ art. 10, 10 U.S.C. § 810 (1958).

⁶⁰ UCMJ art. 35, 10 U.S.C. § 835 (1958).

⁶¹ UCMJ art. 37, 10 U.S.C. § 837 (1958); UCMJ art. 98(2), 10 U.S.C. § 898(2) (1958).

⁶² UCMJ art. 41, 10 U.S.C. § 841 (1958).

⁶³ UCMJ art. 16, 10 U.S.C. § 816 (1958).

⁶⁴ UCMJ art. 25(c) (1), 10 U.S.C. § 825(c) (1) (1958).

⁶⁵ UCMJ art. 51(a), 10 U.S.C. § 851(a) (1958).

⁶⁶ UCMJ art. 57, 10 U.S.C. § 857 (1958).

⁶⁷ UCMJ art. 44, 10 U.S.C. § 844 (1958).

⁶⁸ UCMJ art. 43, 10 U.S.C. § 843 (1958).

⁶⁹ UCMJ art. 55, 10 U.S.C. § 855 (1958).

⁷⁰ UCMJ art. 52(1), 10 U.S.C. § 852(1) (1958).

⁷¹ UCMJ art. 51(4), 10 U.S.C. § 851(4) (1958).

plementation by competent and legally qualified personnel in all stages of the proceedings, including investigation, trial, and review. Prior to convening a general court-martial, the convening authority is required to refer the charges to his Staff Judge Advocate or Legal Officer for advice.⁷² Nor shall the charges be referred to a general court-martial unless there has first been an investigation at which the accused is entitled to be present and represented by counsel.⁷³ In a general court-martial, both prosecuting (trial) and defense counsel must be qualified;⁷⁴ and, in a special court-martial, the accused is entitled to qualified counsel automatically if the trial counsel is qualified.⁷⁵

In addition, the Code provided for a qualified Law Officer for every general court-martial.⁷⁶ He controls the conduct of the proceedings and rules on the admissibility of evidence and interlocutory matters. His functions have been compared to those of a Judge in a civil or criminal case, including the duty to instruct the court as to the elements of the offense, the presumption of innocence, and the burden of proof, though he does not himself vote on the question of guilt or the sentence to be adjudged.⁷⁷

While the drastic demobilization after World War II reduced the Armed Forces by several millions, the crisis in Korea reversed the trend, and required the recalling of thousands of reserves and substantial increases in the draft quotas. The annual total of courts-martial, including general, special, and summary (but excluding non-judicial punishment under Article 15 for which there are no available figures), increased by over 100,000 from 1951 to 1952-53, the peak year of the ten-year period 1951-1961. In the latter year, there were 310,501 courts-martial. Some estimate of the size of the disciplinary problem in the Armed Services can be

⁷² UCMJ art. 34(a), 10 U.S.C. § 834(a) (1958).

⁷³ UCMJ art. 32(b), 10 U.S.C. § 832(b) (1958).

⁷⁴ UCMJ art. 27(b), 10 U.S.C. § 827(b) (1958).

⁷⁵ UCMJ art. 27(c)(1), 10 U.S.C. § 827(c)(1) (1958).

⁷⁶ UCMJ art. 26, 10 U.S.C. § 826 (1958).

⁷⁷ UCMJ art. 26, 10 U.S.C. § 826 (1958); UCMJ art. 51(c), 10 U.S.C. § 851(c) (1958).

made from the Annual Report of the Court of Military Appeals:⁷⁸

Total Court-Martial cases:

May 31, 1951-January 1, 1959.....	1,743,239
Cases Reviewed by Boards of Review.....	119,802
Cases Docketed with U.S. Court of Military Appeals	12,642
U.S. Court of Military Appeals Decisions	1,368

Subsequent figures would bring the total number of courts-martial to about 2,000,000 for the 1951-1961 period, with 127,314 cases considered by the Boards of Review, and about 15,000 cases docketed with the Court of Military Appeals.⁷⁹

Though the trend in the number of disciplinary cases has been steadily and substantially downward, the latest available figures for the last two years, respectively, total 130,458 and 122,713 courts-martial.⁸⁰

Ten years have now passed since the enactment of the Code. The cumulative experience under the Code is reflected in the twelve volumes (totalling over 9,000 pages) of the opinions of the Court of Military Appeals, the twenty-eight volumes of Court of Military Appeals Opinions and selected Board of Review Decisions, the Annual Reports of the Judges Advocate of the separate services, and the past and present suggestions for revision of the Code, varying from slight corrective measures to proposals which could approach fundamental repeal.

At this point in the Code's history, the first decade provides a sufficient period of time and accumulation of experience for a reliable appraisal of the results of the Code "in operation." St. John's Law School, under the leadership of Dean Harold F. McNiece, has chosen *THE UNIFORM CODE OF MILITARY JUSTICE—ITS PROMISE AND PERFORMANCE* as

⁷⁸ [1958] ANN. REP. OF U.S.C.M.A. exhibit B, p. 31.

⁷⁹ Figures submitted by Armed Services.

⁸⁰ These figures are for fiscal year July 1-June 30.

the subject of public observance of Law Day 1961. The school has brought together a number of eminent authorities who have collaborated in bringing the several important factors of such an appraisal into focus, in the hope that such a review will provide an authentic historical survey as well as possibly offering some constructive suggestions for legislative changes and administrative improvements. Such an effort is well worth while as a contribution to the study of contemporary American law. In a deeper sense, this symposium has added significance as a pledge of support to the living symbol of even-handed and humane justice in the American Armed Services, maintaining military discipline as the essential foundation of national strength in a critical era of American history.