St. John's Law Review

Volume 28
Number 1 *Volume 28, December 1953, Number 1*

Article 2

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Robert J. White

HAS THE UNIFORM CODE OF MILITARY JUSTICE IMPROVED THE COURTS-MARTIAL SYSTEM?*

REV. ROBERT J. WHITE, J.C.D.†

"HAS the Uniform Code of Military Justice improved the courts-martial system?" The answer is a decisive "Yes." However, such a cryptic answer would lack completeness if it stopped there and failed to re-appraise the law and to survey its current administration, pointing out certain defects in both and suggesting remedies for them. Moreover, in the sense that law is a seamless web, so is the administration of military discipline, for it reaches out beyond the law and its administration to embrace other integral elements. Certainly, any useful survey of contemporary military justice requires an examination of the problem of morale and its relation to public opinion, particularly the attitudes of parents toward military service and to its essential foundation—the maintenance of discipline.

Much has been said and written about the genesis of the Uniform Military Code. It seems to me well summed in the wisdom of that great patriot, 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." [1]

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* This article is the substance of an address given by the author on September 24, 1953, at a Forum on Military Justice sponsored by the Association of the Bar of the City of New York in Vanderbilt Hall at the Law Center of New York University.

† Former Dean of Catholic University Law School; Rear Admiral, Chaplain Corps, U. S. N. (Ret.); Consultor to Department of Defense; author of "Mobilization, Morale, and Combat Success in the United States Navy"; Senior Member, Board for the Study of Disciplinary Practices and Procedures of the United States Navy (1953).

[1] INDEX AND LEGISLATIVE HISTORY—UNIFORM CODE OF MILITARY JUSTICE 597.

Whether or not the evils were as various and widespread as alleged need not be decided here. However, among the post-war complaints of World War II, that complaint against abuses of so-called "Command Control" was most violent and most disturbing. Such a reaction led to the divorcement of the court-martial and improper interference by "Command Control" as one of the cornerstones of the new Code.

As of today, the powerful provisions of Article 37 of the Code against any unlawful influence upon the Court—before, during, or after the proceedings—and the sanction of a court-martial as punishment for a violation thereof [2] have reduced this evil substantially. This is apparent both in the negative as well as positive evidence from the records of the Court of Military Appeals, the records of the Boards of Review and general observation of the functioning of the Code in the military services. As to the future, there can be no temporizing with improper command influence, nor hesitation in invoking the court-martial sanction for a violation by an officer of whatever rank or position. Only a scrupulous adherence to the Code's mandate can avoid drastic proposals to cut down the jurisdiction of courts-martial—such as that contained in the Universal Military Training system providing for civilian trials of serious offenses. Vigilant watchfulness against the abuses of "Command Control" can alone preserve sound "Command Control," which must always be the core of efficient military operation.

Now the experience of World War II established the fact that courts-martial could not be made to operate effectively and justly simply by the device of legislative prohibitions against abuses. For all studies made after World War II demonstrated conclusively the essential need of legally trained officers in the administration of military justice. The need of a qualified legal guide (Law Officer) for the members of a court-martial on such vital questions as the admissibility of evidence and interlocutory matters was self-evident, particularly in serious offenses. While such appointments might improve courts-martial, the administration of military jus-

[2] U. C. M. J. Art. 98.

tice would still fall far short of desirable standards if it failed to provide for qualified counsel, including defense counsel as well as trial or prosecuting counsel. Moreover, the initial decisions of preferring charges and ordering courts-martial as well as subsequent review called for legally qualified advisers to convening authorities. In some quarters, the new provisions of the Code filling such needs have been subjected to unfounded criticisms which underestimate the legislative history of such reforms. In my study of "Five Hundred Naval Prisoners and Naval Justice," the key question in personal interviews with prisoners was, "Do you feel that you received a fair trial?" A surprisingly large number—four hundred and ten—answered in the affirmative. Of the ninety who complained, the overwhelming number levelled their criticism, with some degree of justice, at the legal incompetency of counsel and court. This was also one of the principal findings of the Vanderbilt Committee of the Army.[3] To be entirely fair to the armed services, the rapid and huge increase of global war had posed an infinite variety of demands—and had created problems of logistics where arms, weapons, and new types of warfare took rightful precedence over the demands for trained legal personnel. No one complained at the time of the necessary and wise policy of "putting first things first."

However, with the advent of peace and the usual post-war phenomena of complaints and investigations, the Congress, with the cooperation of the Military, wisely sought improvement in the legal competence of those concerned with discipline and courts-martial.

The new Code's provisions which require qualified counsel in General Courts-Martial, and as well in Special Courts where the trial counsel is qualified, have placed new and heavy burdens of legal education upon the armed services. That job has been well done. Surely military justice in all its aspects has benefited from the commendable policy of the armed services in bringing several thousand officers and enlisted men—some with legal training and some without—into

[3] VANDERBILT, WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE (The Vanderbilt Report).

schools of military justice. Viewing such instruction personally in the classroom and observing its effects in the field, I have seen the beneficial results not only apparent in students' *learning the letter,* but, as well, *acquiring the spirit* of the Code. Such a development augurs well for the future of military justice.

Many fail to recognize that in any enforcing agency of criminal justice, including Military Courts-Martial, the preliminary task of deciding whether a charge alleges an offense, and whether a prosecution is warranted by the evidence, though unspectacular, is yet critically important. The applicable provisions of Article 34(a) of the Code have proved in practice a sound brake upon hasty and ill-considered prosecutions by requiring the convening authority in a General Court-Martial to confer, at least, with a legally trained officer. One can say without hesitation that such consultation has improved military justice in the preliminary stage. Yet much improvement is still imperative at that stage, for, in a substantial number of cases, prisoners are held for unreasonable periods of time before the court-martial, despite Article 10 which commands "immediate steps" to try or to dismiss the charges. Such unreasonable delays are due in a large part to carelessness and negligence in making ordinary reports and records promptly and correctly. In the face of such a general improvement in trial techniques, it is difficult to comprehend why so many trial counsel have failed to learn the technical yet relatively simple correct method of introducing records of prior convictions. Moreover, some officers still need a sharp reminder that the sufficiency of available evidence to convict is *a question of law and not of policy,* and that *the law* demands a trial without unreasonable delay.

Again, in regard to the current functioning of courts-martial, the Court of Military Appeals deserves credit for its vigilance in compelling the Law Officer to perform his positive duties properly as well as to respect the negative prohibitions of the Code. For the qualified Law Officer is in a key position. He exercises vital functions which cannot be impinged upon. His authority, for example, in making de-

cisions on the admissibility of evidence and interlocutory questions of law brings invaluable professional assistance to a court-martial, yet avoids the preponderant influence he would naturally wield if participating, as formerly in Army courts-martial, in deliberations upon the guilt or innocence of the accused. The Court of Appeals has wisely insisted that the Law Officer charge upon the elements of the offense, and any properly included lesser offenses. This duty is not fulfilled by relying upon off-hand references to the Manual. Moreover, the Court has rebuked Law Officers who give undue weight to fragmentary and slanted manual paragraphs. This Court's decisions reveal a substantial number of reversals on the grounds of forbidden conferences between the Law Officer and the Court outside the presence of the accused and his counsel. These precedents indicate the Court's determined adherence to the spirit of the Code and sense of American fair play. In justice, it must be noted that none of these cases reveal any trace of venality in either the Law Officer or the members of the Court. The temptation of "lay" court-martial members to confer informally with the legally trained law member is human and understandable. Yet, here is a prohibition which wisely preserves the appearances as well as the substance of impartiality, a vital element in the administration of any system of justice.

In this connection, we might note that the Code's provisions to answer the charges of different scales of punishment for officers and for enlisted personnel have not been used in any substantial degree. There have been a few situations where under the new powers of Article 15, non-judicial punishments have been inflicted upon officers. Likewise, the Code's widening of the intermediate Special Court's jurisdiction [4] to include officers has not been used widely. However, both of these provisions are salutary warnings to officers. For the former reluctance to subject officers to the only available punishment, a general court-martial, need no longer deter prompt and effective disciplinary measures upon recalcitrants under Articles 15 and 19. The controversial

[4] U. C. M. J. Art. 19.

Code provision [5] enacted to allow an enlisted man to elect to have enlisted personnel compose one-third of the members of his court-martial has hardly been used at all. While several reasons for such failure to exercise the right may be put forward, the non-use gives at least some reliable evidence that enlisted personnel now feel that officer-manned courts-martial try to deal justly with military offenders.

To be sure, the system is not perfect—but neither is any civilian system. Some criticisms have been levelled at the Code's failure to provide a legally qualified officer as President of the Special Court, which has the power to give a Bad Conduct Discharge. Even if desirable, would such a provision be practical in view of military logistics? Would it be possible in many isolated situations? A satisfactory solution to this problem might be found without the necessity of a positive legislative mandate. On their own initiative, the armed services could remedy such a situation by appointing a legally qualified officer as President of the Special Court where necessary and where practicable. It should not be difficult to differentiate between courts-martial involving simple fact situations such as most absence cases, and those involving complicated situations of fact and law, and to meet the latter by appointing a legally qualified President.

In any such fundamental change as the Code of Military Justice, criticisms are to be expected. From the viewpoint of the Military, their heaviest criticism of the Code has been levelled against the additional burdensome accumulation of paper-work. That criticism is valid. It has delayed the final decisions of courts-martial in all stages and lengthened confinement unduly. Surely some further study is imperative to reduce drastically the whole field of paper-work, particularly in cases involving pleas of "Guilty" and verdicts of "Acquittal."

Another target of criticism, particularly in the Navy and Marine Corps, has been the reduction of non-judicial powers (called "Mast" or "Office Hours") under Article 15. That criticism seems valid as well. For the former law allowed adequate powers to commanding officers to put youth-

[5] *Id.* Art. 25(c)(1).

ful offenders summarily back on the right track in an atmosphere of paternal correction. This avoided the stigma of a court-martial as a "previous conviction." The present reduced powers have caused a serious impairment of discipline. For example, in our Board's recent cross-section study of 253 Summary Courts-Martial, 160 gave punishments which could have been given formerly at "Mast." [6] Thus, 63% of those cases could have been disposed of, without the expenditure of time and effort, by a Summary Court-Martial with a single officer as the Court, far junior in rank and in experience to the ordinary commanding officer of a ship or unit. One has only to read the hundreds of Boards of Review cases to see the end results in "Bad Conduct Discharges" made possible by such earlier Summary Courts-Martial convictions which would not of themselves authorize a Bad Conduct Discharge, but which under Paragraph 127(c)(B) of the Courts-Martial Manual combine to authorize such a discharge.

Usually such cases are in the field of the Military's most difficult problem—"unauthorized absence." Punishments in this category should be increased. For the present popular equation—"so many days unauthorized absence = so much pleasure = so much punishment"—is a real curse to military efficiency. Serious thought should be given to increasing the limits of punishments in courts-martial beyond the six months of confinement and forfeiture of pay without the necessity of a Bad Conduct Discharge—for often such a discharge is the heart's desire of the "B. C. D." striker. Longer confinement without the Bad Conduct Discharge might answer, at least in part, the present dilemma.

In courts-martial reviews under the new Code, Boards of Review of three men shoulder heavy burdens. For such review covers questions of fact as well as law. Moreover, the Boards have the duty of approving only such findings and sentence as they determine should be approved. The Boards deserve praise for their decisions in a laborious field of legal endeavor. In their reviews, it is reassuring not only

[6] WHITE, RAYMOND AND KELLER, THE BOARD FOR THE STUDY OF DISCIPLINARY PRACTICES AND PROCEDURES OF THE UNITED STATES NAVY (1953).

to see sentences set aside for illegality, but also to see substantial cuts in many sentences to conform to the laws' measure of an "appropriate, legal and adequate sentence." Again, it is reassuring to find Boards of Review curbing trial excesses and insisting upon the observance of proper procedure and trial ethics.

The Court of Military Appeals, under the leadership of Judge Quinn, has given military justice great prestige for many reasons. Only a Court which had impressed Washington by its legal ability, industry, and integrity could move itself out of the corridors and musty files of Internal Revenue into its own majestic courthouse—a truly impressive symbol of the importance of military justice in America. Passing over the many organizational tasks, all done well, the Court has certainly builded soundly in its painstaking decisions, tracing the pattern of a broad and solid foundation for the future. Alert to abuses, it has kept the Law Officer in his proper place, but at the same time the Court has vindicated his final authority in proper spheres. The Court has struck down manual-made extensions of military law contrary to the Code. In all of these and other questions, the Court has wisely and courageously distinguished between technical error and substantial prejudice. In the exercise of its reviewing powers, the Court of Military Appeals has lived up to the high standards of judicial review laid down by Dean Roscoe Pound.[7]

Finally, the Court has dealt with the basic and difficult question of the presence and measure of constitutional protections in military law. In the *Clay* case [8] and succeeding cases, the Court has given a scholarly and lucid exposition of fundamental "military due process," which provides basic guarantees of American justice for the members of the armed services.

In its decisions, the Court has soundly refuted those who attempt to break down military justice into two component parts, the *Justice Element* and the *Military Element,* as if they were inherently hostile to, and continually com-

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[7] POUND, ORGANIZATION OF THE COURTS.
[8] United States v. Clay, 1 C. M. R. 74 (U. S. Ct. Mil. App. 1951).

peting for mastery over, each other. For the truth is that military justice is justice—though not measured by the wide scope of civilian freedom—nevertheless, justice, limited, and properly so, by the necessary conditions of maintaining military discipline. History is the expert witness that the survival of a nation can never depend upon "the fatal undependability of military personnel who follow only the beck of their undisciplined will." [9] Realism demands that Americans realize that neither a new Code, nor Courts-Martial Manual, nor Service Regulations, can automatically secure exact justice. Even with the improvement to be expected by training large numbers in military justice, the system must still remain essentially one of non-professional justice in contrast to civilian criminal justice. Consequently, the administration of military justice becomes relatively more dependent upon common sense and good judgment. No thinking person reading hundreds of courts-martial decisions could fail to be affected by the serious, the tragic, the brutal, and even the starkly terrifying crimes. Yet, we must always remember the relatively small proportion of such offenders, and remember as well the fact that the broadened scope of induction from the volunteer to the draftee basis adds significantly to the crime potential in the armed services. As we move from reading the more serious crimes to the great majority of cases involving "absence offenses," and into lesser infractions of discipline, our seriousness is lightened by some very humorous situations. For just as in civilian life, comedy seems sometimes to walk hand in hand with tragedy in the military services as well. It must be admitted that there are a number of such cases which have reached the Boards of Review which common sense, good judgment, and a balanced sense of humor should have settled long before the appellate stage. However, such cases are not cited as a representative cross-section. They are isolated exceptions. But they do pose the questions—"How dependable is such a command for common sense and sound judgment?" "How is the 'morale' in such a command?" And such questions are pertinent to our inquiry, for it is axiomatic that the incident of disci-

[9] Louisville Courier-Journal, Jan. 6, 1953, p. 10.

plinary offenses diminishes or increases as "morale" is strong or weak. Recently General Ridgeway, General Bradley, Admiral Radford, Admiral Carney, Hansen Baldwin, the Army Combat Forces Journal, and the New York Times have expressed serious concern about low morale and poor leadership in the armed services.[10] Division leaders, Chiefs, Non-Coms, and Petty Officers have become the whipping boys. True, they must share the blame, but faulty leadership in higher echelons usually exists in situations involving low morale and a high rate of disciplinary offenses. This is not the time nor place to attempt to fix blame for low morale which I would unhesitatingly place in a large measure upon the shoulders of parents and the public. For experience proves that there can be no synthetic substitute for the basic willing self-discipline of military service. Certainly, putting a man in uniform does not change him instantly. He still retains his pre-induction character, or tragically suffers from the lack of it due, too often, to the default of home, school, and even church training. In these uncertain days, any hostile wedge between the public and the Military can be dangerously harmful to both. Unfortunately, some evidence of such cleavages exists and results in bitter and unfair attacks on the armed services. Why should a small profit-concerned group harass Congress to curb the meager privileges of the commissary and military exchanges? Why should the public, if well-informed, harass Congress to cut appropriations for necessary housing for military personnel and their dependents? Never dismiss the evil of high priced private sub-standard housing as not being a factor in low morale—nor detrimental to military discipline. Cases and facts prove such a relationship. Why the loud protests over an Army order aimed at reducing evil situations by regulated sale of alcoholic beverages on the compound? Why forbid the eighteen-year-old youngster in the service from having a bottle of beer in a wholesome military atmosphere? Why not face the fact that such prohibition results often in patronizing hard-liquor dives tolerated by some civilian communities?

[10] See N. Y. Times, Sept. 3, 1953, p. 10, col. 3; *id.*, Sept. 5, 1953, p. 1, col. 2; *id.*, Sept. 8, 1953, p. 4, col. 4.

In the overall picture no substantial improvement in military discipline can be reasonably anticipated unless suspicions and cleavages between parents and the armed services give way to intelligent understanding and friendly cooperation. In this field of public relations, the armed services have been culpably deficient. In the light of military expenditures for entertainment and other fields of public relations, one may properly ask, "Where is the solid bridge of understanding and mutual confidence between the particular armed service, the boy, and the parent?" What have the armed services done, apart from spasmodic efforts to make parents understand that the first beginnings of unauthorized absence point directly to the end results of a Bad Conduct Discharge? How many parents are aware of the wholesale wreckage of hasty marriages among young military personnel? As one Brig Officer put it: "They all have marital troubles!" How many parents understand the advantages of honorable military service, such as education, loans and insurance? How many parents are aware of the penalties of an undesirable discharge, particularly the Bad Conduct Discharge? It is high time for the armed services to make a planned appeal to the enlightened self-interest of parents in the present critical situation. These are problems—palatable or not—which must be faced and solved.

Surely American genius and character can bring about an intelligent understanding of, and friendly cooperation in, the maintenance of military discipline—the indispensable foundation of the Nation's defense in an armed and threatening world. Each one of you who upholds the administration of military justice according to the letter and spirit of the Uniform Code of Military Justice contributes directly to sustaining the strength of the Nation itself. For indeed, as your influence touches the lives and shapes the character of young Americans, you contribute to a symbol unique in the world today. For that symbol is the military justice of our Nation which imposes military duty as a proper burden of citizenship, yet guarantees humane and even-handed justice such as becomes a Nation dedicated to ordered freedom under "God and the law." [11]

[11] PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 217 (2d ed. 1936) (Coke quoting Bracton).