JAG JUSTICE TODAY

by

CARL B. KLEIN*

In The Catholic University of America Law Review issue of January 1956, there appeared an article by Arthur John Keeffe,1 entitled JAG Justice in Korea.2 Within the space allowed for this reply it will not be possible to discuss everything said by Professor Keeffe in his article. This reply will therefore be limited to a discussion of some of the more controversial things that still remain and have present meaning. The purpose of the discussion is to refresh and widen the understanding of those things. Essentially then, the matters that will be discussed are the following:

1. The background materials of the Uniform Code of Military Justice.
2. The permanent paid part-time civilian advisory council concept.
3. The matter of military justice in Korea during the war.
4. The abolishing of the staff legal officer's review and the boards of review and substituting direct appeal to the Court of Military Appeals.
5. The top clemency board concept.
6. The matter of command control of courts-martial.

*Commander, U. S. Naval Reserve. On active duty, Military Justice Division, Office of the Judge Advocate General, Navy, Washington, D. C. Member of the Bar of the State of Illinois, the United States Court of Military Appeals and the Supreme Court of the United States.

The opinions and conclusions expressed in this reply are those of the author and do not necessarily represent the views of either the Judge Advocate General or the Department of the Navy as a whole.

I am indebted to Capt. Edmund Burke, Jr., USN, for suggestions on the historical background of the UCMJ and to Maj. Cecil L. Cutler, Jr., USA, for information on command control versus command responsibility.

1 Professor of Law, The Catholic University of America School of Law.

7. The bad conduct discharge.
8. The delinquency and educational problem in the military.
10. The foundation of the military system of discipline.

No real understanding of the Uniform Code of Military Justice is possible without at least some acquaintance with the background materials out of which it was fashioned by the Congress. Now, with this in mind, plans for a change in the structure of the permanent Military Establishment were being formulated at about the time the demobilization of World War II forces reached completion. Secretary of War Patterson met with Mr. Willis Smith, President of the American Bar Association, and requested that members of the Association be selected to serve on the War Department Advisory Committee. This Committee was created on March 25, 1946, and consisted of nine outstanding lawyers and Federal jurists from eight states and the District of Columbia. The Honorable Arthur T. Vanderbilt was appointed chairman. The report of this Committee was submitted on December 13, 1946 after months of study and research. At about the same time the Committee on Military Affairs of the House of Representatives, 79th Congress, also made a report on the judicial system of the Army.

In accordance with these studies identical bills for revising the Army court-martial system were separately introduced into the United States Senate and the House of Representatives. After lengthy hearings the House of Representatives passed H.R. 2575. No hearings were held by the Senate on the companion bill. However, toward the end of the 80th
Congress, the bill as passed by the House, and known as the Elston Act, was included as an amendment to the Selective Service Act of 1948 during Senate debate, and later became Public Law 759, 80th Congress.\(^8\)

During this time a very similar development had been taking place relative to the Navy court-martial system. At the request of the Secretary of the Navy, a Committee headed by the Honorable Arthur A. Ballantine, New York attorney and former Under Secretary of the Treasury,\(^9\) submitted its first report in 1943, followed by a second report in 1946.\(^10\) Another committee, reporting in 1945, recommended a complete revision of the Articles for the Government of the Navy. This committee was headed by the Honorable Matthew F. McGuire, United States District Court Judge, District of Columbia.\(^11\) The Reverend Robert J. White,\(^12\) then Dean of the Catholic University School of Law, also made recommendations for changes in the Navy court-martial system as a result of several studies undertaken by him.\(^13\) Another comprehensive report recommending numerous changes in the naval system was submitted by the General Court-Martial Sentence Review Board headed by Professor Keeffe, with Mr. Felix E. Larkin as Vice-President.\(^14\) Based upon the foregoing reports and independent studies within the Department of the Navy, a proposed bill for the amendment and revision of the Articles for the Government of the Navy was introduced in Congress.\(^15\)

It was during the 80th Congress that the National Security Act of 1947\(^16\) was enacted, unifying the armed services and creating a separate Department of the Air Force effective September 18, 1947. Since there were such wide differences between the proposed Army and Navy systems


\(^9\) The membership of the Ballantine Committee included, among others, Professor Noel T. Dowling, Columbia University Law School; the Honorable Matthew F. McGuire, United States District Court Judge; Major General Thomas E. Watson, U.S. Marine Corps; and Rear Admiral George L. Russell, U.S. Navy, then Assistant Judge Advocate General of the Navy.

\(^10\) REPORT OF BALLANTINE COMM. TO SECY OF THE NAVY (1943); REPORT OF BALLANTINE COMM. TO SECY OF THE NAVY (1946).

\(^11\) Other committee members were the Honorable Alexander Holtzoff, United States District Court Judge, and Colonel James M. Snedeker, U.S. Marine Corps. REPORT OF MCGUIRE COMM. TO THE SECY OF THE NAVY (1945).

\(^12\) Rear Admiral, U.S. Naval Reserve (Ret'd).

\(^13\) WHITE, A STUDY OF 500 NAVAL PRISONERS AND NAVAL JUSTICE (1947).


\(^16\) Act of July 26, 1947 (61 Stat. 495, c. 343).
and in order to avoid the establishment of a third system, Secretary of Defense James Forrestal in July 1948 appointed a special committee to draft a uniform code of military justice which would apply equally to all of the Services. Professor Edmund Morgan, Jr., of the Harvard University Law School, was designated chairman, the other members of the committee being: Assistant Secretary of the Army Gordon Gray, Under Secretary of the Navy John Kenny, and Assistant Secretary of the Air Force Eugene Zukert. Supplementing the efforts of the main committee was a working group of approximately fifteen persons, including officer representatives of each of the Services and five civilian lawyers under the chairmanship of Mr. Felix Larkin, who was now Assistant General Counsel in the Office of the Secretary of Defense. After seven months of study the combined efforts of this committee resulted in S. 857, presented to the Senate, and a companion bill, H.R. 4080, presented to the House of Representatives. These bills subsequently resolved themselves into what is known today as the “Uniform Code of Military Justice.”

Thus, as may be seen, the Code did not come about as the result of any hurried rendezvous with time. Almost three years from the appointment of the Vanderbilt Committee in March 1946 had been spent in gathering and collating advice and information. The latter represented all points of view from the ultra-conservative to ultra-liberal as revealed in the expressions of judges, attorneys, teachers, prison officials, chaplains, sociologists, psychiatrists, other civilians, members of the military, bar associations and veterans' organizations. In addition, during the actual hearings on the Code, the Congress heard some thirty-odd witnesses and called for all sorts of special information. It was out of this plenitude of advice and information that the Code was ultimately fashioned.


18 Act of May 5, 1950, 64 STAT. 108 (50 U.S.C. 551-736). Codified and enacted into law as Title 10 of the United States Code, entitled "Armed Forces." Act of August 10, 1956, (Public Law 1028, c. 1041, 84th Cong., 2d Sess., 70A Stat. 36). NOTE: Corresponding sections of Title 10 may be found by adding 800 to the specific Article of the Uniform Code of Military Justice. (Hereafter referred to as the "Code" and in subsequent footnotes as the "UCMJ").


Of course the UCMJ is not a perfect code. There are perhaps in all history only three codes which were perfect in the sense that they met the test of time. One of these is the Code of Hammurabi, instituted by Hammurabi, king of Babylon about 1955-1913 B.C. This code has 282 clauses and shows a certain systematic order. It begins with accusation of murder and sorcery, and passes through all grades of social and domestic life, ending with a scale of wages for all classes of workmen. W. A. Bewes has suggested that much of our modern commercial law is ultimately traceable to this code. BEWEES, THE ROMANCE OF THE LAW MERCHANT (1923). The Code of Hammurabi remained the basis of the legal system of the Babylonian area for nearly 1500 years after Hammurabi's death.
One of the points made by Professor Keeffe in his article is that the Congress should create a permanent paid part-time civilian advisory council. The purpose of this council would be to recommend to the Secretaries of the armed services and to the Congress changes in the court-martial system from time to time, based on the council's observation of the practicability and workability of the court-martial system in operation and based on its appraisal of current trends in civilian criminology.

The principal advocate for the creation of advisory bodies to aid civil courts was the late Mr. Justice Benjamin L. Cardozo. He proposed their creation in a celebrated Harvard Law Review article appearing in 1921. However, in the 38 years since the proposal was made, it has not met with general acceptance in the states albeit the eminence of its sponsorship. It is true that in the interim a majority of the states have established such organizations or some equivalent, such as a judicial conference. But the notion of a paid, part-time or full-time permanent body

Another is the Corpus Juris Civilis or Justinian Code. Immediately after acceding to the throne in 518, Justinian I appointed a commission to go through the whole pre-existing body of law and customs of the various provinces of the Roman empire, to select such laws and customs of the various provinces as were of practical value, to cut these down by retrenching all unnecessary matter, getting rid of any contradictions by omitting one or other of the conflicting passages, and to consolidate the balance into a uniform code. The Corpus Juris of Justinian continued to be the chief law-book of the Roman world till a new system was prepared in the 9th century by Leo the Isaurian and called the Basilica.

The third is the Code Napoleon. This code was undertaken under the consulship of Napoleon I by the most eminent jurists of France, and was published in 1804. The code was the product of Roman and customary law, together with the ordinances of the kings and the laws of the Revolution. Although political upheavals have caused some changes and modifications, the Code Napoleon has remained virtually the same as when it left the hands of its framers. The extent of its influence upon the laws of other countries has been very great, as it formed the basis of the codes, among others, of the two Sicilies (1819), the Netherlands in 1837, the Swiss cantons from 1819 to 1855, Bolivia in 1843 and the Civil Code of the State of Louisiana.

Even though the UCMJ is not a perfect code, it does constitute a great departure from the former system followed in the military. However, an appreciation of the full extent of this departure is something which can only come in time. Time is required not only for the primary task of analyzing the UCMJ, but more important for adequate reflection upon its potential. Reflection is a slow process. "Wisdom, like good wine, requires maturing". (The quotation is from Mr. Justice Frankfurter's reservation in Kinsella v. Krueger, 351 U.S. 470, 485).


The Vanderbilt Committee made a similar recommendation respecting the Army court-martial system. REPORT OF WAR DEPT ADVISORY COMM. ON MILITARY JUSTICE TO THE SECY OF WAR (1946).

Cardozo, A Ministry of Justice, 35 HARV. L. REV. 113 (1921).

VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 87 (1949).
CATHOLIC UNIVERSITY LAW REVIEW

has yet to receive wide acceptance in the states. One of the objections to establishing such bodies with authority suited to what is required to be done seems to have been the fear that in time they might threaten the independence of the judiciary. For this reason those bodies which were actually set up have been kept mostly advisory, with their duties limited to investigating complaints, preparing reports, statistics and bills, and doing special studies. Furthermore, the failure here of certain states to accept this concept at all—and of others to implement it with vigor—would in some measure appear to support this conclusion. It would seem that the ideal of this concept has through the years primarily remained a matter of real interest only to scholars in the law and sociology, and to the learned generally.

Elsewhere, in certain civil law countries, the centralized body charged with the responsibility of law reform is the Ministry of Justice. These bureaus make a continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the country, the work accomplished, and the results produced by that system and its various parts. These powers are not too much unlike those that frame the authority of the judicial councils as have been established in the states. In this connection there have from time to time been some indications in the public media that such powers make it possible for these bureaus to reach down and into the business of a presumably independent judicial system. This is precisely the kind of force that has always been foreign to the American idea of an independent judiciary.

Americans, it would seem, would prefer their justice a little less perfect in procedural matters so long as it is just and free and unrestricted otherwise.

The proposal for establishing a civilian advisory council within the scheme of military justice was submitted to the Congress at the time of the hearings on the Code. The proposal was contained in a statement submitted by Professor Keeffe to the House Armed Services Committee in lieu of testifying. In his statement Professor Keeffe made a strong and eloquent argument in favor of such a council. The statement itself was based upon the report brought forth by his General Court-Martial

---

24 Id., at 41-43.
25 E.g., the organizations already established are by and large ex officio committees. Id.
26 MINISTRY OF JUSTICE, Institute of Judicial Administration (2 U-68), June 25, 1954, p. 1. This sheet contains an excellent bibliography on advisory councils.
Sentence Review Board in which this proposal of his had first been made. Of no little interest here is the fact that the report of the General Court-Martial Sentence Review Board was available to the working group under Professor Morgan of which Mr. Felix Larkin was chairman. As already mentioned the latter had been Vice-President of this board under Professor Keeffe. As one of the signers of the board's report, Mr. Larkin was undoubtedly familiar with its contents including the recommendation for establishing a civilian advisory council. Although Mr. Larkin did most of the testifying on the Code before the House Armed Services Committee, the Code as drafted by the committee and adopted by the House made no provision for an advisory council.

The Code next came before the Senate Armed Services Committee. Following the usual hearings, the committee left the Code in approximately the same form in which it was passed by the House. However, when the Code reached the Senate floor Senator Wayne Morse of Oregon moved for its amendment. In the course of the ensuing debate Senator Morse invited the Senate's attention to an article written by Professor Keeffe and Mr. Morton Moskin which appeared in the Cornell Law Quarterly in the fall of 1949 under the title *Codified Military Injustice*. At Senator Morse's request the article was ordered printed verbatim in the congressional record. The article, covering some 20 pages, contained a detailed discussion of the things which the authors found objectionable in the Code as passed by the House. They concluded:

"The only hope for improvement is to condition passage of the Code upon the appointment of an advisory council—and this is what was suggested by the Navy's General Court Martial Sentence Review Board in 1947.

"Such a body can be relied upon to follow this court-martial reform to the bitter end."

Still, the Code, as passed by the Senate, made no provision for establishing an advisory council within the scheme of military justice.

Professor Keeffe says that the hearings should have been conducted by the Judiciary Committees of the House and Senate since their membership is limited to lawyers only. The rosters of the Armed Services Com-

---

mittees at the time of the hearings show that about half of the members had legal training. Within this context there should be no need for committees to be composed entirely of lawyers in order for them to judge the value of a civilian advisory council in matters of military justice inasmuch as committees are ruled by majority vote. Moreover, during the floor debate in the Senate, a motion was made by the late Senator McCarran, then chairman of the Judiciary Committee, to refer the Code to that committee. On vote, the motion was rejected 43 to 33. So that much of what is said by Professor Keeffe on the matter of an advisory council for the Services has already been considered and rejected by both sides of the Congress.

In lieu of a civilian advisory council the Congress provided for the Court of Military Appeals and the Judge Advocates General to meet annually to make a comprehensive survey of the operation of the Code and report to the Congress the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to the Code, and any other matters deemed appropriate. It has been generally conceded that the provision for a civilian Court of Military Appeals constituted the most revolutionary new concept introduced to the scheme of military justice. It was therefore in keeping with this new concept for the Congress to cloak the Court with powers sufficient to appoint committees as required to make recommendations regarding any of these matters. In the past the Court has appointed such a committee—the Seymour Committee—to make recommendations respecting the Code. The accounts available at the time indicated that this committee discharged its responsibility in a commendable manner. That such a committee was appointed is in itself evidence of the fact that these powers are not wanting in potential. Furthermore, there is the ever continuing interest in and awareness of the conduct of the military establishment maintained by the members of the Congress, particularly on the part of the Armed Services Committees, which should not be discounted here. For the Congress, in the exercise of its inherent power, may set up an ad hoc or select committee at any time to inquire into the desirability of change in the Code.

33 UCMJ, Art. 67(g).
34 The members of this Court Committee were Whitney North Seymour (Chairman), Ralph B. Boyd, Henry T. Dorrance, Felix E. Larkin, Joseph A. McClain, Jr., George A. Spiegelberg, Arthur E. Sutherland and Donald L. Deming. ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES 24 (1953).
As a result of the rich experience harvested by the Court in developing military law under the Code, there is reason to believe that the Congress would want to hear the individual members of the Court whenever considering any broad amendments to the Code. And, while so doing, there is also reason to believe that the Congress would want to hear too any other witnesses who might wish to be heard, including witnesses for the armed services. Under such circumstances a civilian advisory council would be in no position to speak with easy authority on such matters. The most that such a council could do would be to synthesize in the form of a bill whatever information was gathered by it. But this is exactly what the Congress itself does whenever it holds hearings preparatory to writing a bill. The hearings before the Armed Services Committees in connection with the military pay bill passed during the last session of the Congress is an excellent illustration of this synthesizing at work. The committees not only heard as witnesses members of the Cordier Committee but also persons of their own choosing as well as others who expressed a desire to testify.

The proposal for establishing a civilian advisory council is essentially a proposal for creating another committee save only that it would be a statutory committee with pay. As to this, it is considered that such a committee would in time share in the evils peculiar to governmental agencies generally. As every lawyer engaged in the practice of administrative law knows these statutory agencies always begin zealously alive to the public interest. Soon, however, they come to identify as the public the litigants that appear before them. And soon they lose the zeal that promoted their formation as they become rigid in their thoughts and judgments. The good originally expected of them soon loses much of its will. The kind of nonpermanent committee typified in the appointment of the Seymour Committee would seem to be much more desirable for the Services than the kind of permanent, bureaucratic committee inherent in Professor Keeffe's proposal since the former would always allow for a sense of enthusiasm alive to the moment. Moreover, it would preserve

---

the committee concept from deteriorating into another example of how bureaucracy in government grows.\textsuperscript{38}

The Uniform Code of Military Justice was approved by the Congress on May 5, 1950 and became effective May 31, 1951. The period between the two dates, when the Code was approved and when it was to become effective, was the period of time allowed the armed services to indoctrinate their personnel in it. It was also the period allowed the Services to prepare, print and publish a manual explanatory of the Code.

For the Navy the Code represented something new in the administration of military justice. For them the Code constituted a new approach from that previously followed under the Articles for the Government of the Navy. Under the circumstances the Navy considered that a good deal of missionary work would be required in order to insure a smooth launching of the Code on May 31, 1951.

However, on June 27, 1950—that is, almost eleven months before the Code was to become effective—President Truman ordered the Army to aid South Korea and the Navy to protect Formosa against possible aggression and keep the Chinese Nationalist forces from attacking the mainland. Overnight a period of peace became a time of war. And with the change came a shift in emphasis as the military knuckled down to the immediate business at hand. The mood of Congress revealed itself in formal speeches and in the lobbies, corridors and cloakrooms. Over the nation a period of gray mobilization set in, with expanded draft quotas, reserve recalls and accelerated production of the sinews of war.\textsuperscript{37}

Meanwhile, in Korea, the war had begun to take on an ominous form. The soldiers were in a land and among people that most of them found different, and in a war that all too few of them understood and none of them wanted. Many of the soldiers were lately trained only in the softening and vitiating duty of the occupation in Japan. As a result some officers were unable from time to time to hold their lines of battle firm and intact. Increasingly the lines wavered as troops abandoned positions that might have been held. Communication between units became

\textsuperscript{38} At the time of the hearings on the reorganization of the Department of Defense during the last session of the Congress, the press indicated that there were upwards of 500 committees in the department. This figure did not seem to include the number of interdepartmental committees in the separate services. E.g., Wash. Daily News, May 17, 1958, p. 2, col. 1.

\textsuperscript{37} TIME, July 17, 1950, p. 11.
all but nil. The situation was termed fluid and confused, for there were
times when it seemed everybody had everybody else surrounded as the
manpower from China’s bottomless well flowed down Korea’s central
mountain corridor.  

With this as the situation the commanders began to worry whether
the anchors at Inchon and Pusan would hold while the troops were
being regrouped for a fight back up the Peninsula. There was real worry
on their part whether we might not actually be pushed off the Pusan
Peninsula entirely. Meanwhile, the people back home began to worry too.
Would Armageddon begin with so feeble a fanfare as the muffled Battle
of Korea? Would the pushbutton war of the physicists start among the
gross roofs of a land where men had hardly caught up with Galileo?
Was this place and was this the way in which Marx and Jefferson would
come to final grips? At the time there was no doubt that the Communist
intention to destroy what order existed in the world had been plainly
published and was being implacably pursued.

In due course President Truman recognized the combat situation in
Korea for what it was and took action to strengthen the hands of our
commanders there. With characteristic forthrightness he suspended cer-
tain of the limitations prescribed in the Table of Maximum Punishments
in the Manual for offenses “committed by persons under the command of,
or within any area controlled by, the Commander in Chief, Far East.”
The limitations suspended concerned desertion, aiding or advising another
to desert, absence without leave, assaulting or wilfully disobeying a
superior officer, insubordinate conduct toward a noncommissioned officer,
and misbehavior of sentinels. These were essentially the offenses that
dogged the war from the beginning and almost brought us to our knees.
So, in some ways, it was unfortunate for the Code to become law when
it did. For war is hardly a time to begin a new system of military justice.
War seems to have its own sense of urgency and to respect no other.

40 MANUAL FOR COURTS-MARTIAL, U.S. ARMY 1949, par. 117c.
42 Professor Keeffe cites two cases to illustrate the point that an advisory council should
Three items listed by Professor Keeffe have a common denominator and therefore blend easily for discussion under one point. He believes that the staff legal officer’s review and the boards of review should be abolished, and that the Court of Military Appeals should be enlarged and divided up into panels with direct appeal from the convening authority to the Court of Military Appeals. For ease of handling, these three items will be discussed in the order stated.

At the outset it should be said that staff legal officer reviews are not secret documents. There is, of course, no provision in either the Code or the current Manual which requires that these reviews be distributed to counsel. Nor is there any prohibition which forbids their distribution in this manner. On the other hand there are many known instances of staff legal officers giving copies of their reviews to counsel. The records themselves often reveal this information. Sometimes a brief or memorandum of law appended to the record of trial will make specific mention of the review in the case. Sometimes a brief or memorandum of law which arrives later in the Office of the Judge Advocate General will disclose the fact. Sometimes distribution will be noted on the review itself. Since there is no requirement or prohibition respecting these reviews, the matter would appear to be one addressed largely to the sound
discretion of the staff legal officers themselves. Such procedures as have been followed by these officers in the past would seem to have found acceptance on the part of counsel. For, the reviewing authorities in the Office of the Judge Advocate General of the Navy are not aware of any complaint in this regard having ever been filed in a case.

In several cases the Court of Military Appeals has focused its attention on the problem of the adequacy of staff legal officer reviews. In these cases the decisions of boards of review were reversed because of the inadequacy of such reviews, and the records were returned to an appropriate reviewing authority for further proceedings. These decisions indicate that a mere literal compliance with the provisions of the Manual in the preparation of staff legal officer reviews will in instances fail to provide the legally acceptable review to which the accused is entitled.45

The importance of these cases lies in the repeated categorical statements of the Court that it would expect and require a staff legal officer to raise the standard of his review to that of a judicial review. While the minimum standards of reviews by staff legal officers have always been known, these reviews have not been generally understood as being on the same level with judicial reviews. This emphasis by the court is vastly important in that it no longer leaves uncertain the exact position of these reviews in military law.

45 In United States v. Grice, [8 USCMA 166, 23 CMR 390, (1957)] the Court stated what it would now require in the implementation of the Code and Manual in the matter of these reviews. In clear and certain language the Court said: "In pursuing the advisory function set forth in Article 61, [UCMJ], it is incumbent upon the staff judge advocate to apply the same legal standards that would be employed by the convening authority in determining a given legal problem. A staff judge advocate has no command authority and no test is to be applied by him except in his capacity as legal adviser to the commander. His advice, therefore, must utilize the standards that the commander himself would use."

In the Grice case, supra, it appeared that the staff judge advocate advised the convening authority that since the court-martial had seen and heard the witnesses and resolved a factual issue against the accused, he (the staff judge advocate) "may not disagree with that decision." The Court considered such advice erroneous because it indicated that the staff judge advocate had considered himself bound by the findings of the court-martial on questions of fact. Since the staff judge advocate has no authority or function but to advise his commander, the Court concluded that the advice was tantamount to informing him that he too was bound by the court's findings. In United States v. Johnson [8 USCMA 173, 23 CMR 397 (1957)] the staff judge advocate, after discussing the evidence presented, said, "where as here there is sufficient legally admissible evidence to support their findings, it should not be disturbed." The Court ordered a new review because the quoted language was capable of being interpreted as applying the stricter appellate rule of legal sufficiency involving sufficiency as a matter of law and not of fact. Again, in United States v. Katzenberger, [8 USCMA 497, 24 CMR 307 (1957),] where the defense of alibi was raised, this comment of the staff judge advocate required reversive action: "Also, the court saw and heard the witnesses (a privilege not accorded reviewing authorities); thus, the court's
Besides being notable in this respect these cases also show in practical application the manner in which the Court goes about bringing, in time, evolution to the administration of military justice.

The boards of review in the Navy enjoy virtual autonomy in their operations. Except for certain logistic support in the form of office space, clerical help, supplies and pay, the boards conduct their business completely independent of the Office of the Judge Advocate General. Approximately half the membership of the boards is composed of civilians. Furthermore, the boards are the masters of their own opinions in the same manner as a three-man court. The ratio decidendi is that required in a particular case: it is set out by the author and adopted by at least one concurring member; and, once pronounced, the statements remain in the opinion without change. Much the same might be said of Appellate Government and Appellate Defense Counsel. Some of the most experienced attorneys in the Office of the Judge Advocate General are assigned as
determination should not be disturbed unless the denial of the accused as to the allegation and the testimony of the witness supporting his alleged movements is such that no reasonable person could disbelieve it.” See also United States v. Fields, 9 USCMA 70, 25 CMR 322 (1958); United States v. Westrich, 9 USCMA 82, 25 CMR 344 (1958); United States v. Bennie, No. 11, 884, de'c'd January 30, 1959.

In other cases the Court has stated that a staff legal officer's review "must do more than summarize; it must also advise." United States v. Fleming, 8 USCMA 729, 25 CMR 233 (1958). That it must contain a reasoned evaluation of both the legal and factual sufficiency of the evidence. United States v. Westrich, 9 USCMA, 82, 25 CMR 344 (1958); United States v. Acker, 9 USCMA 80, 25 CMR 342 (1958); United States v. Howes, 9 USCMA 78, 25 CMR 340 (1958). That it must make a factual evaluation of the proof against the back-drop of the "reasonable doubt" standard. United States v. Romero, 8 USCMA 524, 25 CMR 28 (1957). That it must individualize the clemency recommendation without regard to a particular command policy or viewpoint. United States v. Wise, 6 USCMA 472, 20 CMR 188 (1955); United States v. Peterson, 8 USCMA 241, 24 CMR 51 (1957); United States v. Plummer, 7 USCMA 630, 23 CMR 94 (1957).

The recital by staff legal officers in their reviews of matter adverse to the accused has recently drawn the Court's attention. In United States v. Vara, [8 USCMA 651, 25 CMR 155 (1958)] the Court has suggested that a copy of the post-trial review, or at least the clemency portion thereof, be served upon the accused or his counsel some time prior to the action of the convening authority and early enough so that a reply to the latter may be submitted or a brief filed before the board of review. Accord, United States v. Smith, 9 USCMA 145, 24 CMR 407 (1958). While the Court has recognized that wide discretion must be afforded staff judge advocates and legal officers in their determination of the matters to be included in their reviews, the Court has indicated that "the exercise of this discretion is of course a proper subject of consideration upon appeal." United States v. Fields, 9 USCMA 70, 25 CMR 332, 337 (1958).

For purposes of military law a board of review is a judicial body. United States v. Whitman, 3 USCMA 179, 11 CMR 179 (1953); United States v. Reeves, 1 USCMA 388, 3 CMR 122 (1952); United States v. Brasher, 2 USCMA 50, 6 CMR 50 (1952).
counsel. Their briefs are the result of their own efforts and they remain
the product of their own creation.\textsuperscript{47}

The most that has ever been expected of all these is that they de-
velop fully in their briefs and arguments and decisions basic concepts
of policy and principle, stressing not only the rules but the reasons behind
the rules. They are expected to aid in the development of sound and en-
during principles of law without regard to the effect that such principles
may have on the individual case under review. And they are conscious
of the thought that with the development of such a framework of law,
the traditional military concept of court-martial ought to fade in time
into the past.

There are a total of 17 boards of review in the Army, Navy, Air
Force and Coast Guard. By law these boards consist of three members
each, for a total of 51 people. In the year ending December 31, 1957
these 17 boards reviewed a total of 12,193 cases.\textsuperscript{48} Thus, if the members-
ship of the Court of Military Appeals were to be increased in order to
provide for direct appeal from the convening authority, the membership
would have to be \textit{substantially} increased for the Court to accommodate
any such number of cases. The Court could, of course, establish some sort
of screening process by which commissioners would dispose of certain
cases. But this approach would hardly seem desirable since under it the
approval of findings and sentences would in the last analysis represent
little more than the frailties of one person's view. The basic thought be-
hind the creation of the appellate procedures in the Code was to vest an
accused with a right to more complete reviews in terms of legal standards
than he had been entitled to under prior law. In this way it was considered
that an ultimate finding of guilty and sentence thereon would represent

\textsuperscript{47}Boards of Review evolved as the result of slow but steady development in the ad-
ministration of military justice over a span of 30 years. Army boards date from World
War I. It was in 1918 that the War Department promulgated General Order No. 7 re-
quiring review by a board in the Office of the Judge Advocate General before any serious
sentence could be carried into execution. The essential provisions of this Order became
statutory in 1920 as Article of War 501/2. This was modified by Article of War 50 in the
1948 revision of the Articles of War. The latter empowered boards to weigh evidence,
judge the credibility of witnesses and determine controverted questions of fact.

The right of a board to affirm only such findings of guilty as it finds correct in law
and fact remains the same today. The greatest single change brought about in the powers
and duties of the boards under UCMJ is the power to affirm only so much of the sentence
as it finds appropriate. As provided for today this discretionary power is limited only by the
provisions of the statute violated as further limited by the Table of Maximum Punishments.

\textsuperscript{48}ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY AP-
PEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES 29
(1957).
the competent legal views of many rather than just a few people. It is true that some states do not have intermediate appellate tribunals comparable to the Circuit Courts of Appeal, and that appeals in these states lie directly with the Supreme Court of the states. But these courts do not handle anywhere near the case load processed by boards of review in the course of a year's time.

The principal task of the Court of Military Appeals is to be the final arbiter of the law applicable to courts-martial. It is the Court's responsibility to build a simple unified framework of the principles of military criminal law within which the court-martial system can function effectively. The proposal that the Court be enlarged in order to provide panels for direct appeal from the convening authority contains at least one serious practical limitation in this respect. For, in time these panels would only bring forth varying interpretations of the law as is much the case with appellate tribunals generally. The law is a pragmatic science and the men who administer it rarely deal with the absolute. Questions of how

---

49 After consultation with members of the Court of Military Appeals, Representative Philbin (Massachusetts) has introduced H.R. 4040 in the present session of the Congress. While the bill falls short of gaining life tenure for Court members, it nevertheless is designed to enhance the dignity and standing of the Court and to clarify its status. Specifically, the bill will:

(a) Raise the Court to the level of the highest (Supreme) court of a territory by equating the rights, etc., of the judges to those of a Court of Appeals without going so far as to give them life tenure.

(b) Confirm the standing of the Court as already recognized by many, but not all, of the Federal Courts. A notable example of recognition of the already high standing of the Court of Military Appeals was given by the District of Columbia Court of Appeals in Shaw v United States, [209 F. 2d 811 (1954)]. By inclusion of the Chief Judge in the Judicial Conference, the Court is recognized as an integral part of the judicial branch of the government.

(c) Eliminate any vestige of control by the Executive. The provision in the UCMJ for removal of a judge by the President has been dropped. Henceforth, removal would be accomplished by impeachment in the same manner as a Court of Appeals member. The bill also transfers the right of designating a judge of the Court of Appeals to fill a temporary vacancy from the President to the Chief Justice.

(d) Take the judges and Court employees out from under the Civil Service Commission and eliminate any control by that body.

(e) Eliminate certain provisions such as that requiring that no more than two judges may belong to the same party. The latter are more appropriate to an administrative agency or a commission than a court.

The bill is concerned entirely with the internal structure of the Court, its constitution and the individual rights, etc., of its members. It in no way enlarges or diminishes the jurisdiction of the Court. Its position remains unchanged and there will be no impact whatsoever on substantive military law.

On the theory that a court of enhanced dignity and standing can be expected to render even greater service, it would appear that the bill ought to be enacted by the Congress even though there is no provision for life tenure. (A Democratic congress is not likely to grant life tenure to a court, two of whose members are Republicans.)
far and how much constantly intrude, and the questions of degree they introduce require for their solution determination of doubtful facts and comparative valuing of interests which have no institutional equivalents. In the very nature of things, if the court-martial system is to function as it must, there can be no room in it for conflicting interpretations of law that are all equal in authoritative importance. Hence, there would be some question whether the court could possibly discharge its mandate if this proposal to abolish the boards of review were ever given serious consideration.

Another recommendation by Professor Keeffe is that there should be a top clemency board on equal standing with the Court of Military Appeals.\(^50\) The function of this board would be to receive petitions from accused who are dissatisfied with their sentences and to oversee in some manner the equalizing of sentences. The board would be a statutory board and would report annually to the Congress.

Clemency in the Navy is a matter about which not too much is really known. Now, the Code provides a number of "built-in" clemency features for use in the administration of military justice. These features begin with the commander who convened the court. In addition to approving, disapproving or modifying a sentence, the convening authority may exercise the power of clemency.\(^51\) The boards of review have, in addition to the power to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, also the power to exercise clemency in a case.\(^52\) The boards are fully conversant with their

---


\(^{51}\) Manual for Courts-Martial, United States, 1951, par. 88c.

\(^{52}\) UCMJ, Art 66(c). In explaining this power the Court of Military Appeals in United States v. Lanford [6 USCMA 371, 378, 20 CMR 87, 94 (1955)] said: "One of the principal matters Congress considered at the time of the enactment of the Uniform Code was the establishment of a procedure for review of the sentence which would insure a fair and just punishment for every accused. To achieve that purpose, Congress gave the convening authority the power to approve a sentence in his discretion. But it made his decision subject to review by a board of review. United States v. Brasher, 2 USCMA 50, 6 CMR 50; United States v. Cavallaro, 3 USCMA 653, 14 CMR 71. The name by which the board's power is denominated is really unimportant. What is important is that, within the limitations of its own authority, the board of review can, in the interests of justice, substantially lessen the rigor of a legal sentence. The board of review, therefore, can be compassionate; it can be lenient; it can be forbearing. If one prefers to call the influence of those human qualities in the mitigation of a sentence the exercise of the judicial function of determining legal appropriateness, the description is proper. Tah Do Quah v. State, 62 Okla Cr 139, 70 P2d 818. On the other hand, if one wishes to call it clemency, that de-
responsibility in this matter, and are quick to recognize a grant of clemency in a meritorious case. In one case, for instance, the board characterized the clemency action of the convening authority as "leadership at its very finest." These commendatory remarks by the board resulted in the Secretary of the Navy's awarding the convening authority a letter of commendation. Even though the Court of Military Appeals may not reduce a sentence under the provisions of the Code, nevertheless the Court does indirectly exercise this power in appropriate instances. The Court does this by returning a case to the Judge Advocate General for reference to a board of review for determination of an "appropriate sentence."

In this matter of clemency the Judge Advocate General has a vital role under the Code. In this connection the Code provides:

"The Secretary of the Department, and when designated by him any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President."

The report of the Committee on Armed Services which accompanied the Code to the House explained this article as follows:

"Under this article the Secretary of a department may review the sentence of any court martial, which will give him clemency and parole powers as well as ultimate control of sentence uniformity."

Thus, the Congress installed the Secretary of the Navy as the ultimate controller of clemency in Navy sentences. Pursuant to this requirement of law the Secretary has delegated to the Judge Advocate General the power to suspend and remit any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President of the United States. Under this authority the Judge Advocate General reviews the sentences of all court-martial
cases received in his office for appropriateness of sentence and further clemency. This examination is made, as a rule, after final action by the board of review or Court of Military Appeals in a case. In the exercise of this clemency power the Judge Advocate General is not limited to matters appearing in the record of trial. He may, and he does, consider matters outside the record of proceedings. Over a period of time the Judge Advocate General has reduced the sentences in five to ten per cent of the cases involving punitive discharges.

Aside from these "built-in" features of clemency in the Code, the United States Naval Clemency Board exists as another source of clemency. This board was established pursuant to precept by the Secretary of the Navy to make recommendations relative to the exercise of the residual clemency power vested in the Secretary in respect to men serving sentences. The board considers for clemency cases involving an unsuspended punitive discharge, confinement in excess of eight months or confinement less than eight months in exceptionally meritorious cases (hardship, etc.). The board may initiate clemency on its own motion in any case in which the exercise of clemency appears appropriate. A prisoner serving a sentence of eight to 24 month's confinement is eligible for consideration after completion of four months and annually thereafter. One with more than 24 month's confinement may be considered after completion of six months and then annually thereafter. For a sentence of less than eight months the board will consider a request for clemency any time before the sentence is completely executed. A punitive discharge may not be executed prior to action of the board unless the person has waived his right to request restoration. A person confined in a federal prison is entitled to the same annual review of his case by the board as all other naval prisoners.

The board is required to submit for Secretarial approval recommendations in every case considered by it. In reaching these recommendations the board considers the background of the prisoner, his civil and military history, his adjustment in confinement or while awaiting completion of appellate review if not confined, motivation for future service, the nature and circumstances of the current offense, the recommendations of the commanding officer and local clemency board, report of the psychiatrist stationed at the confinement facility, and the recommendation of the Chief of Naval Personnel or Commandant of the Marine Corps as appropriate.

The award of clemency by the Secretary on recommendation of this board is completely separate from the legal aspects of a case, and is based in part on the wishes, attitude and conduct of the prisoner, and
largely on his rehabilitation possibilities, and also all other information about his personal history before or after the offense for which he was convicted and which might have no connection with that offense. In this connection the board will entertain the testimony of any witness whom the prisoner might wish to be heard. Among others, the board has heard in the past the testimony of the prisoner's family, friends and former superior officers, as well as social workers and counsel for the prisoner. As may be seen the Secretarial precept permits the board to exercise a wide amount of discretion in recommending clemency.\(^9\)

If the clemency opportunities in the military are compared with those in civilian life, it will be readily observed that nowhere is a civilian defendant afforded so many clemency opportunities as is a military accused. For, prior to confinement a civilian defendant is given only one such opportunity through the referral of his case to a probation officer in a federal district court.\(^8\) And after confinement a civilian defendant is

\(^8\) SECNAV INSTRUCTION 5810.6C, March 4, 1958, pp. 1-8 (Dept. of the Navy, Office of the Sec'y).

Besides these enumerated sources of clemency, there are three additional possible avenues of relief: (a) the Navy Discharge Review Board authorized by Section 301, Servicemen's Readjustment Act of 1944, as amended [38 U.S.C. 693h], (b) the Board for Correction of Naval Records authorized by Section 207, Legislative Reorganization Act of 1946, as amended [5 U.S.C. 191a] and (c) appeal to the President for pardon.

A death sentence requires approval of the appropriate Secretary and the President before it can be carried into execution. This requirement is an additional "built-in" clemency feature in cases in which the supreme penalty has been adjudged. UCMJ, Art. 71(a).

In passing, it may be interesting to note that the Naval Clemency Board has been in existence for over 30 years. Its mission relative to clemency has remained unchanged since it was established on February 7, 1928 by the Honorable Curtis D. Wilbur, then Secretary of the Navy. The name too has remained the same except that from 1943 to 1947, it was called Naval Clemency and Prison Inspection Board and from then to January 1951, it was known as the Naval Sentence Review and Clemency Board.

\(^9\) The Manual provides that evidence of previous convictions may be used as evidence in aggravation. This evidence, however, must relate to offenses committed during a current enlistment, voluntary extension of enlistment, appointment, or other engagement or obligation for service of the accused, and during the three years next preceding the commission of any offense of which the accused stands convicted. When the last enlistment, appointment, or other engagement or obligation for service was terminated under other than honorable conditions, or when the accused deserted and subsequently fraudulently enlisted, all convictions by courts-martial of offenses committed in the prior term of service, if within the three-year period, are admissible. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, par. 75b(2).

If this rule in the military service is compared with the rule followed in civilian life, some things become apparent. The Probation Officer's report, which constitutes evidence in aggravation and mitigation for determining punishment in a case, contains a full list of a man's previous convictions in civilian life. The list details not only convictions for serious offenses but also for minor offenses as well (traffic violation, etc.). It includes convictions from all jurisdictions without regard to State or Federal jurisdictional lines. And unlike in the military service, the list includes convictions over the whole span of a man's life.
afforded only one avenue of clemency—this time, the federal probation system. Of course, a civilian defendant can appeal to the President of the United States for a pardon whenever he believes his case deserving of this consideration.

The cry of evil about the administration of military justice is often tied to the sentence adjudged by a court-martial. Seldom is this impression removed later by publicizing with equal vigor the sentence that was finally approved and which the accused actually served. It would seem that the measure whether a sentence in military law is substantially reasonable and just ought to be the sentence remaining after final mitigation. Certainly a sentence adjudged by a court-martial has as much basis in the order of reality as a sentence adjudged by a civil criminal court.

For instance in the Navy, for the period of March 1, 1957 through February 28, 1958, the convening and supervisory authorities suspended the punitive discharge on probation in 756 cases. A follow-up study later indicated that approximately 50 per cent of these suspensions were successful—that is, that the accused had not become involved in other court-martial proceedings or had not had their suspensions otherwise vacated within the period for which their sentences were suspended. In a great many instances the convening and supervisory authorities themselves reduced the sentences to confinement and forfeiture of pay.

In the six month period ending June 30, 1956, the median sentence in the Navy for prisoners committed was 6.7 months; for the period ending December 31, 1956, 6.5 months; for the period ending June 30, 1957, 6.1 months; for the period ending December 31, 1957, 6.4 months; and for the latest period for which statistics are available ending June 30, 1958, 6.2 months. On the basis of time served by the prisoners during these periods, these statistics reflect a median sentence of 5.1, 4.9, 4.9, 4.9, and 4.6 months, respectively. These statistics take into consideration all sentences to confinement, including long-term sentences, served in the retraining commands. The only sentences not reflected are the sentences being served under the federal penal system.

The semiannual reports containing these1 and similar statistics are distributed to the various commands at the time of publication. Actual and prospective court members, convening and supervisory authorities,  

---

1 NAVY-MARINE CORPS PRISONERS, SEMI-ANNUAL STATISTICAL REPORT, 1 January-30 June 1956; 1 July-31 December 1956; 1 January-30 June 1957; 1 July-31 December 1957; 1 January-30 June 1958 (Dept. of the Navy, Bureau of Personnel, Corrective Services Division).
boards of review, as well as the Judge Advocate General will usually be impressed by the consensus of their peers throughout the Navy and of their superiors in the chain of review. Through the regular publication of such statistics the Navy places a continuing emphasis on the clemency aspects of punishment.

The recommendation for establishing a top clemency board contains the proposition that the board should be a permanent one created by statute. Without restating what was said earlier about the rigidity of the civilian advisory council concept, all said there is equally applicable here. Moreover, this recommendation should cause men to pause at the implication inherent in it, since in the military neither discipline nor clemency can operate effectively in a vacuum. Nor can one function without the other. If the prime responsibility for the exercise of clemency were ever divorced from the chain of command, military discipline would no longer be the personal thing that it is.

The \textit{bete noire} woven through the whole of Professor Keeffe's piece is command control. The inference here is that Professor Keeffe equates command control of courts-martial with command influence over courts-martial. It would seem that he regards all command control as evil command control.

At the time the Code as drafted by the Morgan Committee was submitted to the Armed Services Committees for consideration recommendations were also made by critics and protagonists of command control. One bar association strongly recommended an independent judicial system within the Services which would take over a court-martial case once it had been referred to trial.\footnote{\textit{Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services}, 81st Cong., 1st Sess. 633, 636 (1949).} Another critic of command control stated the proposed Code would not accomplish the desired result of achieving a real system of military justice unless command control was entirely eliminated.\footnote{\textit{Id.}, at 646.} However, most of the opponents of command control conceded that it would be impracticable to place the administration of military justice entirely in the hands of civilians. But to remove the control of commanders it was urged that the Judge Advocates General be given the authority to convene courts-martial, with the added authority to
appoint the members and counsel. Advocates of this procedure likewise envisaged the establishment of a separate Judge Advocate General's Corps in each Service to insure freedom from command control. On the other hand, champions of retention of command control were prone to point out that some element of supervision was essential to preserve the effectiveness of the nation's fighting forces. This viewpoint was best stated by Secretary of the Army Robert Patterson in the following words:

"Many of the critics overlook the place of military justice in the Army or the Navy. An army is organized to view victory in war and the organization must be one that will bring success in combat. This means singleness of command and the responsibility of the commander for everything that goes on in the field * * * And when critics say you ought to have a completely independent judiciary, they overlook the primary purpose of the army, namely safeguarding the nation and winning the war."

After weighing all the arguments respecting command control the Armed Services Committees recommended to the Congress passage of a code substantially in the form drafted by the Morgan Committee. The House subcommittee in its report to the Congress stated that "perhaps the most troublesome question presented was that of command control." It considered moving the authority to convene courts-martial from "command" and placing that authority in judge advocates or legal officers or at least in a superior command. However, the subcommittee subsequently rejected these notions, stating:

"We fully agree that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations."

The avoidance of evil command control would appear to have been precisely the reason for which the Congress rejected the Judicial Council concept and created for the first time a court in the person of the Court of Military Appeals. Since its formation the Court has expressed its

---

64 Id., notes 62, 63.
65 Id., notes 62, 63.
67 H.R. REP. No. 491, 81st Cong., 1st Sess. 7 (1949).
68 Id.
views in upwards of 100 cases on the subject of command control alone.\textsuperscript{69} Some of the more important cases are cited infra.

The first case dealing specifically with command control was \textit{United States v. Gordon}.
\textsuperscript{70} Here the Court dealt with factors which disqualified an officer from convening a court. In such a situation the prejudice to the accused arises from a presumption that unlawful influence might be exerted rather than from acts which amount to the actual exercise of such influence. The Court established the criterion by which it would determine when the convening authority is an accuser in a case. In its holding the Court rejected the test long used in military law that the personal animus of a convening authority must be shown. The Court ruled that the test should be whether the convening authority "was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter." In \textit{United States v. Jewson}\textsuperscript{71} the Court applied the principle that a convening authority who directs an investigation while acting in line of duty is not to be regarded as an accuser. Apropos to this, the Court remarked that to hold otherwise would "extend the rationale of the \textit{Gordon} case beyond the limits of its logic." The point present was that the person who signed the charge sheet and had thereby become the actual accuser, had made no personal investigation of the matter. He had obtained his facts only through the investigation directed by the commanding general who subsequently convened the court. And, in \textit{United States v. Smith}\textsuperscript{72} the question whether the convening authority was disqualified on the theory that by directing amendment of the charges he had become a prosecutor, was presented for consideration. In rejecting this proposition the Court stated that the convening authority is by statute charged with the duty of deciding the nature and severity of the offenses to be tried and the type of court to decide the issues. It was the Court's view that the action of a convening authority in ordering an accused tried on a greater offense than the first one alleged is not of such

\textsuperscript{69} The Court of Military Appeals in \textit{United States v. Clay} [1 USCMA 74, 1 CMR 74 (1951)] laid down the general pattern it intended to follow in instances of command control when it spun the doctrine of \textit{military due process}. This doctrine is fundamental to any issue of command control since it is based upon the congressional intent to place as reasonably as possible military justice on the same plane as civilian justice. The Bill of Rights was originally adopted not because its provisions had previously been violated but so all might know that they were never to be violated. The doctrine in the \textit{Clay} case, \textit{supra}, would appear to stand precisely upon the same plane.

\textsuperscript{70} 1 USCMA 255, 2 CMR 161 (1952).

\textsuperscript{71} 1 USCMA 652, 5 CMR 80 (1952).

a personalized nature as to disqualify him from further performing his official duties.

A commander's control over the court-martial system extends through the chain of command to subordinate commanders charged with certain responsibilities in the disposition of court-martial charges. The Court of Military Appeals has recognized the responsibility of a commander for matters pertaining to discipline within his command, even indicating that he would be abdicating his duties if he ignored disciplinary problems. In one case, the Court remarked:

"* * * the responsibility of a commanding officer for the maintenance of discipline within his command and the proper conduct of courts-martial cannot be questioned. In matters of discipline, failure to curb the unlawful tendencies of his subordinates may demonstrate lack of capacity to command."73

In this connection there is the case of United States v. Hawthorne74 wherein the Court enunciated the principle that the exercise of proper command responsibility in administering the military justice system may become unlawful command influence when it directly tends to control judicial processes rather than merely attempting to improve the discipline of the command. In this case a commanding general published a policy directive concerning elimination of offenders. The order outlined statistics reflecting a much greater proportion of offenses committed by a group as against those by inductees. In pertinent manner the order provided that any charge against a soldier with two admissible previous convictions should be referred to a general court-martial in order that the provisions in the Manual regarding the award of a sentence to bad conduct discharge upon proof of two or more previous convictions, could be utilized. Citing this directive the commanding officer recommended that Hawthorne be tried. He was convicted and sentenced to a punitive discharge, total forfeitures and confinement for one year. In setting aside the verdict the Court in a split decision stated that the policy directive was an attempt to control judicial processes since the directive denied to the accused's immediate commander and other commanders in the chain of command their discretionary power to reach an independent decision regarding disposition of the case.

Commanders exercise their greatest control over the court-martial system in its pretrial stages. And it is here that unlawful command in-

---

73 United States v. Isbell, 3 USCMA 782, 14 CMR 200 (1954).
74 7 USCMA 293, 22 CMR 83 (1956).
fluence can mostly be exerted. For command influence can become part of the appointment of a court-martial when the convening authority chooses personnel who might merely express his desires rather than use independent judgment in deciding a case. As to this, in *United States v Deain* 75 three officers of a general court-martial were permanent members with the senior officer assigned the duty of preparing and submitting to the convening authority fitness reports on the other two members. The Court of Military Appeals held in this situation that the appointment of a senior officer charged with the duty of keeping other members in line and preventing the exercise of their independent judgment constituted prejudicial error.

The first important case on the question when a command may give pretrial instruction to court members as authorized in the *Manual* was *United States v. Littrice.* 76 In this case the executive officer on behalf of the commanding officer held an instruction period for court members immediately prior to trial of the accused for larceny. This officer read an excerpt from an Army headquarters circular on pretrial instruction after which he advised the members that they should not usurp the prerogatives of the convening authority in the matter of sentences since court-martial records were thoroughly reviewed by higher headquarters. He then read portions of a letter from the theater commander to the convening authority entitled: "Retention of Thieves in the Army." This letter called attention to inappropriate sentences given convicted thieves in past cases. It advised that court members should be selected with care and be best qualified by reason of age, education, training, experience, length of service and judicial temperament, and noted that where court members have verified by their performance these qualities, the fact should be recognized by appropriate notation in efficiency reports or by other written communication. In reversing the case the Court of Military Appeals said that under the facts there appeared a definite attempt to exert unlawful command influence. The Court found particularly obnoxious the provision relating to efficiency reports. As to the policy concerning retention of thieves, the Court observed: "It is one thing to announce a general policy and yet another to use that principle to influence the finding and a sentence in a particular case."

75 5 USCMA 44, 17 CMR 44 (1954).
76 3 USCMA 487, 13 CMR 43 (1953).
This specific problem was again raised in *United States v. Isbell* in which the accused was convicted of larceny and housebreaking. Here a letter identical to the one in the *Littrice* case had been disseminated within the command. In addition the staff judge advocate circulated a bulletin to all officers in the command for future guidance. The bulletin reviewed errors and irregularities of previous courts-martial and pertinently referred to improper acquittals and inadequate sentences. All except one of the court members acknowledged on *voir dire* familiarity with the communications but denied they would be influenced by them. In a split decision the Court of Military Appeals affirmed the principle expressed in the *Littrice* case. It distinguished that case from the instant case by saying the commander's letter was read to the court members immediately prior to trial, whereas in the instant case the distribution of the bulletin and commander's letter was made prior to the commission of the offenses of which the accused was convicted and prior to the appointment of the court.

The Court of Military Appeals has equally condemned any attempt to exert unlawful command influence during the trial of cases whether by the convening authority or by any other officer including a member of the court itself. Here, in *United States v. Whitley* the membership of a special court-martial was reduced by challenge to three ensigns. During direct examination of the first witness the president of the court sustained a defense objection to rambling by the witness. The trial counsel then obtained a recess after which he advised the court that a new and more qualified president was to be appointed. This was subsequently accomplished by the addition of a new member senior in rank. On appeal the Court of Military Appeals termed the action of the convening authority as contravening both the spirit and letter of the *Manual* since it imposed command control over the very heart of the judicial process, and concluded that this was command control in one of its most serious aspects. In *United States v. Guest* the trial court was recessed for an out-of-court hearing by the law officer to hear arguments on a motion for a finding of not guilty. The acting staff judge advocate, who had been a spectator at the trial, furnished the president with a board of review decision pertaining to the motion. When the court reopened the law officer granted the defense motion subject to objection by the court. After argument by counsel the president asked trial counsel to read the portions

---

78 *5 USCMA 786, 19 CMR 82 (1955).*
79 *3 USCMA 147, 11 CMR 147 (1953).*
of the board of review decision previously shown the president by the
staff judge advocate. In a strongly worded opinion the Court of Military
Appeals considered the conduct of both the acting staff judge advocate
and the president to be highly improper and the interference of this officer
in the proceedings to be a very serious instance of unlawful command
control. In United States v. Fowle a command directive concerning re-
tention of thieves in the service was brought to the attention of the court
by trial counsel after the findings and prior to sentence. Using the Littrice
case as precedent, the Court of Military Appeals found this to be unlawful
command influence amounting to prejudicial error.

This doctrine the Court extended in United States v. Estrada wherein
the accused was charged with larceny. Prior to sentencing, the trial counsel
invited the court’s attention to a policy directive of the Secretary of the
Navy on the retention of thieves and others convicted of offenses involving
moral turpitude. Although in this instance the directive was not read
to the court and despite the added fact that the directive advised discretion
to be used in individual cases, the Court of Military Appeals found pre-
judicial error and ordered a rehearing as to the sentence, stating that “it is
futile to suggest that members of the court disregard the Secretary of
the Navy’s policy.” Along these same lines is United States v. Rinehart in
which the Court extended the rationale of these cases to include the
practice of using the Manual by members of a general court-martial or spe-
cial court-martial (except the president) during the course of the trial
or while deliberating on the findings and sentence. The Court directed
the discontinuance of the use of the Manual in this manner, stating that
the only appropriate source of law applicable to any case is the law
officer and that the court members are not to look to outside sources for
the law either as to the findings or the sentence.

Not only must the members of the court-martial be free from influ-
ence, but also must the law officer be independent in the exercise of his
judicial functions. In United States v. Knudson the accused was tried for
an act of sodomy of which he had been previously convicted by a civilian
criminal court. The defense requested a continuance pending receipt of an
answer to a letter forwarded to the Secretary of the Navy regarding a
policy against a second trial in such cases. The law officer granted the
defense request but the convening authority directed him to resume the

80 7 USCMA 349, 22 CMR 139 (1956).
81 7 USCMA 635, 23 CMR 99 (1957).
82 8 USCMA 402, 24 CMR 212 (1957).
83 4 USCMA 587, 16 CMR 161 (1954).
proceedings. The Court of Military Appeals decided that the law officer had abdicated his power to the convening authority who had no right to review interlocutory rulings made by the law officer while a case is in progress. Again, in *United States v. Stringer*\(^{84}\) the president of the court-martial remarked after certain evidence had been introduced that the case was not ready for trial and that unless the case was better prepared the court might hang an innocent man. The law officer advised the court that the responsibility for preparation of the case was with the prosecution, and that the court should acquit the accused if they find the evidence not sufficient for conviction. Because of these remarks the convening authority withdrew the charges on the next day and ordered a rehearing. The Court of Military Appeals reaffirmed the principle enunciated in the *Knudson* case that the law officer and not the convening authority is responsible for the conduct of a trial, and that the latter cannot assume the functions of the former since the thrust of legislative intent granted autonomy to the court. The Court had previously elaborated on this matter of legislative intent in *United States v. Keith*.\(^{85}\) In that case the Court established the criterion it would expect of law officers in performing their duties under the Code in the following language:

"[T]he complete independence of the law member and his unshackled freedom from direction of any sort or nature are, we entertain no doubt, vital, integral, even crucial elements of the legislative effort to immunize opportunity for the exercise of control over the court-martials process by any agency of command."

Normally the same personal interest or connection with a case which would make out a convening authority to be an accuser on the pretrial level would also preclude his review of a record of trial on the post-trial level. In *United States v. Duffy*\(^{86}\) the convening authority agreed with the findings of the court-martial but disapproved the recommendations of his staff judge advocate who had found reversible error based upon an inadmissible confession. In forwarding the record of trial for appellate review the convening authority stated that the error was a "technical failure" and that he was "loath to permit a man whose guilt was plain to escape his just punishment because of a technicality." The Court of Military Appeals held that convening authorities are not free to brush aside substantial rights secured by mandate of Congress and termed the conduct

\(^{84}\) 5 USCMA 122, 17 CMR 122 (1954).
\(^{85}\) 1 USCMA 442, 4 CMR 34 (1952).
\(^{86}\) 3 USCMA 20, 11 CMR 20 (1953).
in the instant case not only unlawful but lawless. In this area the Court has also indicated that the convening authority should not be the subject of command influence in the review of cases. In United States v. Doherty\textsuperscript{87} the trial court recommended clemency to include remission of the bad conduct discharge adjudged. Through mistaken interpretation of certain Navy Department instructions, the convening authority had approved the punitive discharge with a note to the effect that he could take no clemency action as to this class of offenders because of these instructions. The Court held that the convening authority here failed to make the independent evaluation required of him under the Code. Implicit in this decision is the corollary that the convening authority may not himself establish an inflexible policy to preclude any consideration of clemency. Thus, where the convening authority as a matter of policy never considered suspending a punitive discharge, the Court in United States v. Wise\textsuperscript{88} held this to be a violation of his duty under the Code and Manual to consider each case on its merits with a view to exercising his powers of clemency.

Now, this rather long recital is by no means a full rationale of the cases discussed. Many of them come within the definition of landmark cases in military law and therefore contain much more than what has been said. Nevertheless, this recital does show in some solid and concrete terms how the Court of Military Appeals has been meeting the issue of apparent evil command control in courts-martial. Consequently, there should be some satisfaction in knowing from the past that the Court in the future will continue to give to this matter the sense of importance which the Congress would appear to require, as we all go about maturing in the administration of military justice under the Code.

Professor Keeffe recommends that the Congress amend the Uniform Code of Military Justice to deprive special courts-martial of their present authority to adjudge a sentence to bad conduct discharge. He considers that this sentence is too severe to be awarded by a court which does not have the assistance of a law officer and where counsel are not attorneys. As an alternative, he suggests that trials before special courts-martial be conducted in the manner of trials before general courts-martial whenever there is likelihood of a sentence to bad conduct discharge being adjudged.\textsuperscript{89}

\textsuperscript{87} 5 USCMA 287, 17 CMR 287 (1954).
\textsuperscript{88} 6 USCMA 472, 20 CMR 188 (1955).
\textsuperscript{89} Keeffe, JAG Justice in Korea, 6 Catholic U. of Amer. L. Rev. 1 (1956).
Although there is this provision in the Code for special courts-martial to adjudge a sentence to bad conduct discharge, the Army does not permit its special courts-martial to do so. The reasons for the withdrawal of this authority in the Army are partly traditional and partly those advanced by Professor Keeffe. The traditional punishment to punitive discharge in the Army has always been the sentence to dishonorable discharge. And, as a consequence, this form of sentence is adjudged by Army general courts-martial in far greater number than it is by Navy general courts-martial. In general it has been the practice in the Navy to reserve the dishonorable discharge for crimes involving moral turpitude, or the serious military or naval crimes. Before the Code, Navy courts were advised that they need not adjudge a dishonorable discharge but may in lieu thereof adjudge a bad conduct discharge, if they desired to adjudge a discharge at all. Aside from any other considerations in the matter, it has always been the Navy's view that a sentence to dishonorable discharge carries with it greater reflection against the discharged serviceman and, hence, is more likely to interfere with his adjustment in civilian life than would a sentence to bad conduct discharge.

As everyone knows, the respective military organizations of the Army and Navy are governed by different military concepts. The Army is totally a land based organization while the Navy is essentially a seagoing organization. Every command in the Army is land based, whereas only a few of the commands in the Navy are shore based. The Army's Table of Organization provides for a Corps area arrangement, the Navy's for a fleet-task force arrangement. This arrangement in the Army permits the latter to locate its smaller commands in reasonable proximity to major commands. This is not the situation in the Navy. For, naval commands afloat must be constituted to operate as self contained units. They must be able to operate thousands of miles away from any shore establishment and, if need be, independently of the other units in a fleet or force. And with atomic power, they will be able to remain at sea months-on-end since refueling will no longer be a major problem for them. This fundamental difference in organizational structure between the two Services should point up some of the considerations why the Navy cannot be fitted quite as easily into the same mold as the Army in this matter of special courts-martial.

\(^{90}\) Prior to the Elston Act, the sentence to bad conduct discharge was traditional only in the Navy. Both the Army and Air Force inherited it from the Navy when the Elston Act became law in 1948. Citation note 8, supra.

\(^{91}\) NAVAL COURTS AND BOARDS (1937), sec. 456, p. 232.
In this connection there are a great many more commands capable of exercising special court-martial jurisdiction in the Navy than there are law specialists. Of the latter there are approximately 400 on active duty. Because of the wide disparity that exists between the number of commands and law specialists, the Navy has so far not been able to service all of the commands with them even though the need is there. This fact in itself discounts the present possibility of providing the four or five law specialists that would be required if special courts-martial were to be conducted in the manner of general courts-martial. However, to meet this situation somewhat, the Navy at the moment is thinking in terms of establishing dockside courts and law centers at shore installations which service the fleet. These courts and centers would be available to the fleet as well as shore commands for the trial of accused persons by special courts-martial. But this arrangement, even in its most optimistic form, has some very definite and practical limitations, and involves some very tough administrative and legal problems.

If, for instance, an individual aboard ship is to be tried promptly for an offense committed by him, this condition would require that not only the individual but all of the witnesses be flown or otherwise transported expeditiously to the situs of the court. The number of times that this could be done by a ship without impairing its state of readiness is definitely limited since the table of personnel allowance for a ship makes little provision for any kind of absenteeism. And, in some instances it might be wholly impractical to comply with this condition because of location or mission of the ship, or other valid reason, in which case the individuals would be confined to the brig until either it became practical to do so or the ship put in at an installation where a court is located. Under certain circumstances this confinement could extend over a relatively long period of time. This is one illustration of the kind of problem involved.

While all of this is true, nonetheless, it does not alter the fact that approximately 90 per cent of the individuals tried in the Navy by special courts-martial and sentenced to bad conduct discharge, plead guilty. This ratio is in accord with the ratio found in civilian life where approximately 90 per cent of the persons tried by criminal courts also plead

---

Lawyers in the Navy are known as law specialists, whereas those in the Army and Air Force are known as judge advocates. The Army and the Air Force each have approximately 1200 judge advocates on active duty.

By personal count of cases extending over a period of approximately three years.
guilty. Even by the present system, therefore, it would seem that substantial and equal justice is, in the main, obtained with at least quite as much certainty as by civil courts. Nor does it alter the fact that many assigned counsel to special courts-martial show greater devotion to their clients than criminal attorneys paid marginal fees by defendants in civilian practice. To paraphrase Anatole France’s famous observation, the law, in its majestic equality, guarantees to the poor as well as the rich the right to counsel, the right to refrain from self-incrimination, the right to speedy arraignment. But the knowledgeable know these rights are in civilian practice often drained of reality to those too poor or ignorant to claim them. Oftentimes some municipal court hanger-on is assigned to the poor as counsel and then allowed to squeeze out of them as much of a fee as their poverty will permit. Alongside this, is the additional fact that the expectations of a competent defense of the poor must be found in the zeal of attorneys for justice and their conception of duty as officers of the court. But this zeal can be tempered by practical necessities which may subordinate this duty as an officer of the court. The failure of an attorney here to live up to the idea of public service should not be viewed as moral failure, but as rather demonstrative of the reality that beyond certain limits the public cannot expect attorneys to permit moral commitments to interfere with the material task of earning a livelihood. Under the military system, however, the devotion and zeal of counsel assigned to special courts-martial lie in the virtue of their military duty.  

When an individual is discharged from the military service with a bad conduct discharge, the subject of his discharge ends there insofar as the particular Service is concerned. The consequences that follow the individual into civilian life as a result of having been so discharged are

---

94 The Sixth Amendment’s guarantee of counsel in criminal proceedings has had an interesting history. This right did not originate at common law but was included in the Sixth Amendment in protest of the existing English practice that prohibited an accused from being heard by counsel on the issue of guilt in felony cases. Annot., 3 A.L.R. 2d 1003, 1009 (1949). For almost 150 years this right was construed by federal courts as merely granting an accused the right to be represented by counsel retained by him. Only in capital offenses was a defendant deemed entitled to counsel when he was unable to retain one. In 1938 the Supreme Court changed this construction by holding a court would lose jurisdiction of a case by failing to provide counsel for an indigent who had not waived this constitutional right. Johnson v. Zerbst, 304 U.S. 458 (1938). Three years later the court expanded this view by imposing upon trial forums the duty of advising an accused of his right to counsel where he appears without one. Walker v. Johnson, 312 U.S. 275 (1941); Federal Rules of Criminal Procedure, Rule 44. This refinement of the right to counsel came about therefore by way of decisional law and not by congressional amendment. Ought this not to be the way in this matter of counsel for special courts-martial? See also the dissenting opinion of Mr. Justice Frankfurter in Burns v. Wilson, 346 U.S. 137, 148 (1953).
not matters with which the Service, as such, can bear responsibility. These consequences simply represent the view that society itself attaches to such a discharge. It would appear that service to country has always been reckoned throughout our history as one of the noblest privileges and duties of citizenship. As a result our society has been unwilling to grant equal consideration to those citizens who do not choose to fulfill honorably this privilege when called upon to do so. The legislation enacted by the Congress over the years denying to such persons benefactions and privileges is a harmonious example of this social attitude. Since the Congress is the representative of our society at large, the legislation enacted by it would appear to express more the will of this society that *per se* the individual views of the members of Congress. The fact that some businesses and labor unions may be unwilling to accept such persons for employment or membership is another harmonious example of this social attitude at work.66

Even though society is unwilling to grant equal consideration to these persons, there is however no policy in the Navy which automatically precludes the re-enlistment of individuals previously discharged from the naval service with less than an honorable discharge. Currently, approximately 12 per cent of all applicants previously discharged with an adverse discharge are being accepted for re-enlistment. Nor is there any policy automatically precluding the re-enlistment of persons previously discharged from another Service with less than an honorable discharge. All that the Navy requires is that the applications for enlistment of such persons, if deemed otherwise qualified by the recruiting officer, be referred to the Chief of Naval Personnel for decision as to acceptability under the same standards as apply to individuals in the same category with previous naval service. There are any number of instances in the Navy of men who have been tried by courts-martial as many as seven times in the course of serving a full and useful career.

---

66 Even, in the early days of our military history when "marking" accompanied a sentence to be dishonorably discharged or to be drummed out of the Service, an early military writer tells us that this marking was not calculated to interfere with an individual's adjustment to civilian life. He tells us that the object of the "marking" was solely to prevent the fraudulent reenlistment into the Service of a man once deemed unworthy to remain in it. The regulations provided that the mark was never to be more than one inch long, was to be placed on the hip or other equally concealed part of the body, and was to be done with India ink or gunpowder, or some indelible composition. The latter were considered well suited to the purpose since the marking with such ingredients, being common among sailors and others, was generally understood by the public not to place a known stigma of disgrace upon an individual. O'BRIEN, AMERICAN MILITARY LAW AND COURTS MARTIAL 276 (1846).
In the very nature of things it is immutable to a military organization that there be punishment for the wicked, reward for the faithful and honor for the brave. This is something which society knows—and expects! Under the circumstances it would make little difference by what other name the military service would call a bad conduct charge. Once society would come to know this other discharge as something less than honorable, it would attach its own sense of importance to the discharge. Moreover, the certificate of discharge which a man receives upon discharge from the Service amounts to nothing more in the latter's opinion than an honest accounting to society of the man's service to country. In its opinion the certificate is, simply, the man's report card of that service. The view therefore that society in modern times has attached to a bad conduct discharge is one which has been independently arrived at by it to the exclusion of the military service.

In May 1957 a study was initiated within the Bureau of Naval Personnel to discover the probable proportions of naval personnel who constitute the principal disciplinary problem, the range of patterns of military behavior, disciplinary actions taken with respect to them, and whether information could be found to differentiate the problem and nonproblem groups. This study revealed the existence of a very definite relationship between discipline in the Navy and juvenile delinquency. The study showed that a great many of the individuals discharged from the Navy with punitive discharges have generally followed the behavior pattern of those in civilian life euphemistically referred to as juvenile delinquents. Information reported in the public media as well as that developed in hearings before the Congress on the subject of juvenile delinquency all tend to show that the latter is a problem everywhere present in our society today. With the Universal Military Training and Service Act requiring military service of every male of proper age, there is conse-

---


quently little reason to indulge in any idealism that the Services are unaffected by this problem.

Moreover, the most important influence upon a growing child is that wielded by the adults whom he observes day after day. Certainly the behavior pattern displayed by his parents and the type of behavior which his parents require of him are a primary influence in the character-forming years of the child. In strong words, FBI Chief J. Edgar Hoover has pointed up parental responsibility in the current wave of juvenile delinquency and mobsterism squarely at parents:

"We speak of church and of God's influence upon our people. But in how many homes can the influence of religion truly be found? How many of today's juvenile terrorists are products of unfortunate homes where parents have neither the interest nor the desire to become an integral part of their children's lives? Tragically, the moral decline which is evidenced in our rapidly increasing rates of crime and delinquency can be traced to the very portals of the home. Moral delinquency is so degrading, spiritual illiteracy is so blighting that unless God abides in the intimate atmosphere of the family circle, the best efforts of the church and other wholesome elements in the community may be inadequate to correct the damage already done.

"The family is the first great training school in behavior or misbehavior. Children develop a sense of right and wrong. The home becomes their first classroom and the parents serve as the first teachers for the inspirational education of youth. In the home the child learns that others besides himself have rights which must oftentimes be respected. Here the spadework is laid for instilling in the child those values which will cause him to develop into an upright, law-abiding wholesome citizen. He must learn respect for others, respect for property, courtesy, truthfulness, and reliability. He must learn not only to manage his own affairs but also to share in the responsibility for the affairs of the community. He must be taught to understand the necessity of obeying the laws of God.

"These qualities, of course, are transmitted to the child only if they are exemplified and taught within the family circle."99

How often is it that a juvenile delinquent is encouraged by those who have the primary responsibility for his behavior to enlist in the military service on some secret notion that the Service will make a man out of him?100 And, how often is it that our criminal courts in civilian life will give to a juvenile delinquent a choice of either going to jail or enlisting in the Service?101 Obviously, few such persons come to the

---

100 Bishop, Planting Time Bomb of Delinquency, Evening Star, February 14, 1958, p. A-23, col. 5. Civilians often ascribe to the military the magical power of endowing each of its recruits with maturity and poise where none existed before. They sometimes encourage the youth to enlist with the fond hope that they will emerge from service as men. Shackelford, The Youthful Offender and the Armed Forces, 4 NATIONAL PROBATION AND PAROLE ASSOCIATION JOURNAL 150 (1958).
101 Case records in the major military confinement facilities reveal numerous instances
Service properly disposed to meet the assessment of citizenship required of them under the Universal Military Training and Service Act. The essential mission of the military service is to prepare a body of men who are at all times ready, willing and able to fight the public enemy. Order and discipline are indispensable requisites to the fulfillment of this mission. The Services do what they can to bring men along and to fit them into the scheme of things, but it is simply not given to the Services to reform what has so long been neglected by others.

Even a casual student of the history of education in our country must acknowledge that we have been witnessing nothing less than a revolution in our conception of the purpose of schools. This revolution in educational philosophy began with the Deweyean progressives about 1915 and gained momentum in the 1920's. The system advanced by these progressives became known as progressive education. The early advocates of this system believed that the aim in education was simply undefined growth. Although the term “progressive education” is today largely a term descriptive of a movement belonging to history, the system however has left its mark on the philosophical side of education. The great current educational controversy is in part over the mark left by this system. For, the controversy is between those who believe the school should primarily be an agency for the intellectual development of individuals and those who believe it should primarily be an agency for social conditioning.

There are some recent but interesting milestones along this revolutionary road in the philosophy of education. In 1940 the American Council on Education published a pamphlet entitled: "What the High Schools Ought to Teach." This pamphlet deplored the emphasis on mathematics and English in high school, describing them as "difficult" subjects and as "stumbling blocks" that drive young people away from high school. Foreign language study was belittled and it was remarked that only "a few pupils need mathematical physics." Four years after the publication of this pamphlet a report was issued by a commission of the National Education Association, called Education for All American Youth. This report said that "the job of the school is to meet the common and specific needs of youth." Soon after this report was released by the com-

in which youthful offenders were encouraged, urged, or induced to join the services in lieu of a sentence, continued probation or parole supervision, or further incarceration. Shackelford, The Youthful Offender and the Armed Forces, 4 NATIONAL PROBATION AND PAROLE ASSOCIATION JOURNAL 148 (1958). See S. REP. No. 1429, 85th Congress, 2d Sess. 12-13 (1958) for statements of courts following this practice.
mission a department of education in one of our states recommended that the report be translated into an actual program. It suggested that high schools should teach in addition to the traditional subjects the following: Socio-economic problems, home care of the sick, driver education, safe living, industrial hygiene, care of children, community health, home decorating, consumer education, personal grooming, hospitality, housing, boy and girl problems, and an understanding of reproduction.102

In 1948 came *Higher Education for American Democracy, A Report of the President's Commission on Higher Education*. This said that “we shall be denying educational opportunity to many young people as long as we maintain the present orientation of higher education toward verbal skills and intellectual interests.” The highlight in these milestones was reached in 1951 when the United States Office of Education brought forth its famous bulletin called: *Life Adjustment Education for Every Youth*. This bulletin reported that 60 per cent of American youth are incapable of being prepared either for college or trained for skilled occupations; that only a small minority of students can comprehend abstract mathematics; that only a few have either the ability or the need to write and speak with accuracy; and that educators may feel satisfied if they have taught the majority enough reading to comprehend newspapers and magazines “reasonably well.” What is needed for this 60 per cent, or the majority of American youth, said the report, is a program of “Life Adjustment.” According to the report this program was to bear little resemblance to traditional programs in the fundamental skills and intellectual disciplines, but was to make the school a sort of gigantic social service agency aimed not at education but adjustment.103

The inability of American youth to meet the challenge of military life today would seem directly related to this revolution in education which has encouraged the public to accept in the schools a soft pedagogy in every conceivable form. For, it has caused the public to forget what is central in their tender regard for what is peripheral. The strong emphasis on the desire to use the schools to promote physical and emotional stability, pleasant personalities and social adjustments has caused the public to lose sight of the fact that the purpose of schools is to provide a program containing those symbols and those facts which are essential to all later learning. A program of such solid content provides the bright and average students alike with some inner resources with which to counter mass

---

103 Id.
superstitions, customs and vulgarities. It aims to make the youth in time literate in the various fields of organized human knowledge. This was the idea of the function of the school which was uppermost in the minds of the great pioneers of public education one hundred years ago. They reasoned that a democracy is based on the idea that not only the elite but also the ordinary, run-of-the-mill person is capable of intelligent judgment in contributing to the whole, and that hence everyone has the same need for acquiring the learning that is indispensable to the formation of that judgment. This reasoning was not predicated upon any sophistry that all people have the same inherent abilities or can benefit alike from the refinements of higher education. But this reasoning did assume that there is a certain corpus of knowledge which is needed by everyone and which can be transmitted to all except the definitely moronic.\textsuperscript{104}

That the reasoning of these great pioneers in education was essentially based upon a sound philosophical concept is demonstrated by present day experience in the Navy. The study generated within the Bureau of Naval Personnel\textsuperscript{105} revealed the existence of a clear connection between the education or noneducation of an individual and the ability of the individual to respond to military discipline. The study found that men with a low GCT\textsuperscript{106} and a good education\textsuperscript{107} have the lowest average for repeating military offenses, and that men with a similar GCT but poor education have the highest average for repeating military offenses. The report established the significance of this finding by observing that while men with low GCT's may have only limited chances of achieving a petty officer career because of high naval standards, they nonetheless are well able to accommodate themselves to the demands of military life in instances where a low GCT is accompanied with a good education. The report also found that the bulk of the naval persons discharged from the naval service with a bad conduct discharge is largely composed of persons with poor education, and that, in the main, it would appear to make little difference whether these persons have a high or low GCT if they have not had good education. Similarly, other findings of the report support the premise that the disciplines of a good education are essential to the formulation of judgments upon which successful military service is

\begin{thebibliography}{9}
\bibitem{104} Id.
\bibitem{106} General Classification Test. This test is essentially a measure of learning ability, scaled from 21 to 78 in the normal range, with a normal median at 50, which equates to an Intelligent Quotient of approximately 100. Low GTC, 41 and under.
\bibitem{107} Eleventh grade and above.
\end{thebibliography}
based. Without such an education individuals are simply ill-prepared to assume this responsibility of citizenship.\textsuperscript{108}

The military services are large consumers of the product of our educational institutions. Unfortunately, this product does not measure up to what is required by the Services today.\textsuperscript{109}

The primary purpose in proposing revision of the Code to provide for single-officer special courts-martial in the person of a law officer is a desire to improve the efficiency of the administration of military justice. As a result of suggestions made from time to time by the Court of Military Appeals the Services have been striving to grant law officers more of the power possessed by civilian judges and to adopt from the Federal Rules of Criminal Procedure those rules which would provide beneficial disposition of military cases. Since the proposal is one of prime interest to the Services at this time—and is also one about which Professor Keeffe has misgiving\textsuperscript{110}—it invites discussion.

The Code confers on the President power to prescribe rules of procedure, including modes of proof, which shall "as far as he deems practicable, apply the principles of law and the rule of evidence generally recognized in the trial of criminal cases in the United States District Courts" that are not inconsistent with or contrary to the Code.\textsuperscript{111} By passing this provision the Congress indicated its desire that the conduct of courts-martial shall be in accordance with the rules generally recognized in the

\textsuperscript{108} A recent press release stated that the Army in two-and-a half years has demobilized 70,000 men and is expected to demobilize an additional 25,000 in the near future. The release stated that "new personnel policies—including a ruthless weeding-out of substandard soldiers unofficially termed 'Operation Meathead'—is largely responsible for the change." Evening Star, January 7, 1959, p. A-7, col. 7.

\textsuperscript{109} E.g., if the emphasis in our schools is on "Life Adjustment," then it would seem that the schools would by now have some courses on how to get along in the Service and on the consequences that follow in not getting along. One of the announced purposes of schools is to prepare students for citizenship. Military service is a requirement of citizenship.

On this educational point, in general, see \textit{Rickover, Education and Freedom} (1959).


The bill, H.R. 3387, containing this proposal, was introduced by Representative Vinson (Georgia), Chairman of the House Armed Services Committee, on January 26, 1959 for consideration by the present Congress. The bill has the approval of the judges of the Court of Military Appeals and the Judge Advocates General of the armed forces. The Navy nurtures real hope that this proposal for establishing single-officer special courts-martial will in time find such solid acceptance on the part of the Congress and legal fraternity at large as to merit in their judgment a broader use of it than is now stated in the bill.

\textsuperscript{111} UCMJ, Art. 36.
trial of criminal cases in the federal courts. In this regard Rule 23(a) of the Federal Rules of Criminal Procedures provides—

"Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government."

This provision for waiver of jury trial by the defendant was formalized by the federal courts in March 1946 and embodied the existing practice that had grown up through the years. This rule, or a similar rule, has long been followed in most states. In many states by express provision the constitution and statutes permit waiver of jury trial in criminal cases. In other states statutory provision is made for trial without jury unless demanded by the defendant, or practice otherwise allows for waiver of jury trial in particular situations. The fact that the federal and state courts have long followed the practice is some indication that it has a good basis in law, and that the weight of juristic thinking is on the side of the rule. In fact, the constitutionality of Rule 23(a) has been upheld many times.

The infusion of many principles of civilian law into the military law by the Code has created situations which were not formerly presented to court-martial authorities. Formerly, in order to be fairly proficient, one in the Navy had only to be familiar with the provisions of its manual entitled Naval Courts and Boards and the Articles for the Government of the Navy. Now, however, the Court of Military Appeals is day by day creating a body of case law which is as important as the Code itself to one engaged in military justice work. It is true that some case law existed in the Navy even before the advent of the Code, but this law was relatively unimportant in that it was largely composed of ad hoc decisions. Under the Code the decisions of the Court of Military Appeals exercise a far greater influence than did the decisions of former days. Hence, one engaged in military justice work today is no longer able to rely strictly upon the provisions of a manual and the Code, but needs to have training in the principles of procedural and substantive military justice law as contained in cases decided by the Court of Military Appeals.

The impact of the decision in United States v. Clay, for instance,
has made the position of the **president** of a special court-martial difficult in instances when he is called on to instruct the other members of the court on the elements of the offense charged, presumption of innocence, rule of reasonable doubt and burden of proof. Experience has indicated that often-times it is a case of the blind leading the blind. The various aids for court-martial attempt to fill this void by providing a short synopsis generally of a half dozen lines. While this ready-made, capsule-type instruction may be sufficient in cases involving simple issues, such pre-fabricated instructions are obviously wholly inadequate in cases involving unusual facts since they ignore particular problems presented by the evidence. In unanimously overturning the conviction in the *Clay* case for failure of the president to instruct in these areas, the Court stated that "the accused was denied those necessary elements of military due process by which Congress sought to protect him."\(^{118}\) The establishment of law officer special courts-martial would do much to guarantee to accused persons rights and safeguards "parallel" to those granted to civilians and observed by civilian courts.

Unlike in the case of general courts-martial, there is no requirement that the records of special courts-martial not involving a sentence to bad conduct discharge must be referred to a staff legal officer for opinion in advance of action by the convening authority. In former days the prerogative of the convening authority to determine what portion of a sentence adjudged is correct in law and fact without prior legal advice stemmed from the concept that the entire machinery for review was set up merely to furnish trustworthy information to the officer to whom there had been delegated the disciplinary function. This concept was based upon military history and more particularly upon a decision of the Supreme Court of the United States in the case of *Dynes v. Hoover*\(^{116}\) to the effect that courts-martial are established not under the Judiciary Article III of the Constitution, but under Article II which makes the President commander-in-chief and Article I which gives Congress power to make rules for the government of the land and naval forces.\(^{117}\) However, the Congress in enacting the Code shifted the emphasis from this concept to the one pronounced by the Supreme Court some 30 years later in the case of *Runkle v. United States.*\(^{118}\) There the Court said:

\(^{115}\) Id., at 82.
\(^{116}\) 20 How. 25 (1857).
\(^{118}\) 122 U.S. 543 (1887).
"The whole proceedings from its inception is judicial. The trial, findings and sentence are the solemn act of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law."

A record of trial, therefore, coming up for action by the convening authority, which reflects what has transpired in a case tried before a law officer, would furnish to him, by indirection at least, some measure of legal opinion regarding the findings and sentence adjudged in the case.

Under the Code the court-martial system is more and more being examined not only for its military effectiveness but for its basic justice as measured by American ideals. In this connection there have from time to time been indications in the public media that the reports of proceedings in special courts-martial often leave much to be desired. These indications would appear to constitute one of the more important reasons for establishing law officer special courts-martial. For experienced lawyers know that after the excitement of a trial is over the record of proceedings is all that remains behind in a case to protect the rights of an accused to such further due process to which he might be entitled under the law. It has always been that those who do not in their daily pursuit brush intimately with the practice of law are unable to grasp fully the significance of a lawyer's jealous regard for the record. Yet so much so is this regard that, whenever need be in civilian practice, opposing counsel will engage their own court reporters in order to safeguard and protect the record from error and chicanery. Knowing this, no law officer, true to his oath as a lawyer, would presume to affix his signature to a record which did not fully report the trial conducted before him.

As already mentioned, the records of courts-martial in the Navy reveal that approximately 90 per cent of the special court-martial cases in which the sentence involves a bad conduct discharge are based upon guilty pleas. The Navy believes that in the vast majority of cases an accused desiring to plead guilty would probably elect to be tried by a law officer court. With the system of prearranged pleas (borrowed from civilian practice) now being followed in the Navy, this probability would even grow. The accused would be insured the opportunity to be tried by an officer of mature judgment in matters of law. The latter, being a trained and capable lawyer, would be in a better position to weigh and

\[\text{\footnotesize \textsuperscript{119} See note 93, supra.}\]
analyze impartially the evidence of mitigation and extenuation or of aggravation that follows conviction, and to know from his experience in legal affairs what would be an appropriate sentence for the offense that has been proved against the accused persons. Certainly law officers are better qualified to fix and adjudge sentences than are members of courts who have neither training nor any minimum experience in military justice when they sit as court members.

During World War II Canada adopted a provision for a single-officer court-martial when an Order-in-Council created a court entitled a "Standing Court-Martial" to try enlisted personnel. As a result of this Order-in-Council 25 officers were appointed to sit as a one-man court, with the powers of a general court-martial. The officers appointed were qualified lawyers or judge advocates serving in the Canadian army. The individual members, traveling from place to place as needed, tried some 12,500 cases during the period May 1944 to September 1946. Only a very small percentage of the persons convicted by these courts submitted petitions for redress. Under these courts the commander of the accused's unit had only a limited power to review, but anent to this he had also the discretion to order a case tried instead by a normally constituted court-martial. In view of the practical advantages and favorable experience with this form of tribunal the Canadian Government caused to be enacted following World War II permanent legislation providing that the Governor-in-Council may, in an emergency, establish one-officer standing courts-martial to try any person in the military service charged with committing a service offense. The success of the system in Canada would seem to furnish some real evidence of the desirability of this system under the Code.

An examination of the pertinent items of legislative history indicates that there existed at the time the Code was enacted into law a deep seated conviction on the part of Congress and other sponsors of the Code that law officers should perform in the image of a civilian judge. By and large, the law officers have satisfied this great expectation. For under the present system, regardless of statements to the contrary, the experience has been that a law officer is subject to little, if any, control by higher
authority, other than decisions of boards of review and the Court of Military Appeals. Law officers know that evidence of deference in the trial record, or even outside of the record, adversely affecting the rights of an accused would bring quick action on the part of the boards of review and the Court of Military Appeals. They have come to know only too well that their rulings and decisions are subject to review by these appellate bodies, and that any deference of the kind mentioned would bring them naught.

Moreover, the military lawyer, when he dons uniform, nevertheless remains a lawyer subject to his professional code of ethics. His interest in military justice is by its nature an interest in a field of law. By virtue of his status in the military service, his time is spent more in the field of the administration of military law than with military discipline, and is concerned with its improvement. Since this is his interest he is almost certainly less well informed within the sphere of military discipline under ordinary circumstances than court members as a whole. Being aware that evil command influence is improper, there is every reason to believe that a military lawyer when sitting as a one-man special court-martial will adopt every course within his capability to eradicate it. Furthermore, the independent position of the law officer in the present day scheme of military justice is now known and generally understood. This knowledge and understanding should augur well for the success of this proposal. Surely, the experience factor with the law officer concept to date ought to be strongly persuasive evidence in this respect.¹²³

There is no principle more thoroughly incorporated in our military, as well as in our civil law, then that the citizen on becoming a soldier does not merge his former character in the latter. On becoming a soldier the citizen does not release himself from any of his former duties or obligations. Instead, he engages to perform other duties in addition to those with which he was formerly charged. He submits himself to a special code of laws which does not supersede or abrogate that to which he was formerly subject. On the contrary this special code binds him by

¹²³ Recently 30 selected Army, Navy and Marine officers began a three-week intensive law officer course at the Judge Advocate General's School at the University of Virginia prior to assignment. Evening Star, February 20, 1959, p. A-26, col. 5. This press release indicates in an affirmative manner the way in which law officers are being educated and re-educated by the Services in order to insure a high standard of performance by them.
a new tie to the very same authority which he previously obeyed as a citizen. He stands in precisely the same position he formerly occupied with regard to the civil powers and authorities. He cannot throw off the obligations and responsibilities which the civil powers and authorities impress upon him inasmuch as he does not cease to be a citizen.124

The military law aims solely to enforce on the soldier the additional duties he has assumed. For the military code begins where the civil code ends. The military law finds a body of men, who besides being citizens, are also soldiers. It finds that their rights and duties as citizens are already well settled and established, but that their rights and duties as soldiers are undefined and unascertained. The military law aims to fill this vacuum left by the civil code in order to place the soldier as completely under cover of law and to guard him as securely against tyrannical and arbitrary power in his military character, as in his civil character. The foundation of the military system of discipline is, therefore, the same as the foundation of our civilian system of discipline—

The preservation of the dignity of the individual.125

---

124 In re Grimley, 137 U.S. 147 (1890).