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Military Justice--A Uniform Code for the Armed Services

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NOTES

Military Justice—A Uniform Code For the Armed Services

In May, 1951, a new uniform code for administering military justice will become law.¹ For the first time in the history of the nation, all branches of its armed forces will be subject to the same military code, uniform in substance and uniform in interpretation and construction. Soldier, sailor, and airman will be treated alike, for practically all purposes. But they will find few radical departures from the systems authorized under the old Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, which this Uniform Code supplants.

With the creation of a separate Department of the Air Force and the unification of the services, it was more logical to have a single code for all branches than to construct a third code for the Air Force. In 1948, Secretary of Defense James V Forrester appointed a special committee, headed by Professor Edmund Morgan, Jr., of Harvard Law School, to draft a uniform code. The committee worked seven months to produce this code, which covers both the substantive and the procedural law governing military justice and its administration in all of the armed forces of the United States.

If unification of the services required a single new code, surely the changed concepts of military justice required no less. A courts-martial system that worked well for a small, volunteer army of career soldiers was not acceptable to a large, non-volunteer, citizen army.

It is not proposed, within these pages, to survey the entire body of the new code. Much of it is a mere rearrangement and restatement of articles

¹ 64 STAT. 108 (1949), 50 U.S.C. §§551-736 (1950). (References to U.C.M.J. indicate numbered articles in the Uniform Code of Military Justice, 1950.) A courts-martial manual, with detailed rules of procedure, regulations prescribed by the president, and various forms and outlines, will shortly be issued as an operating supplement to the Uniform Code of Military Justice.

found in the old regulations. The writers primarily intend to point out only those significant changes which seem to graft concepts of civil justice onto military law and those unchanged sections that are most notoriously offensive to civil justice concepts.

COMMAND CONTROL

More than other single feature in military law, the influence of the commanding officer over courts-martial has drawn critical fire. This influence has been aptly labelled "command control"² and consists of the legal and illegal powers wielded over military trials by the commander. The court's subservience to the commanding officer remains the most vital defect in military justice.

Traditionally, the commanding officer has been empowered to order trial for an accused, to appoint prosecution counsel and defense counsel, to select the members of the court, and to review the court's findings and sentence. The Uniform Code does not divest the commander of a single one of these powers. The men chosen to serve as counsel, judge, and "jury" are directly responsible to the convening authority, who is their commanding officer for purposes of assignment, efficiency rating, and promotion.³

Professor Morgan explains that the convening of courts, reference of charges, and appointment of members were left in the hands of the commander because of the "military nature of courts-martial."⁴ This is a frequent excuse for lack of reform in this area. Says Senator Wayne Morse, a member of the subcommittee hearing testimony on the Uniform Code:

I have an impression — in talking to military-justice men that they are so steeped in their military-justice training that they have lost sight of the practicality of getting rid of what, I think, are a lot of military procedures that they can dispense with and substitute therefor out-and-out procedures of our civilian criminal courts.⁵

It is ironic that men whose future in the army is entirely dependent upon their commander's good will are appointed by this commander to a court which is expected to be free from his influence!⁶

² Farmer and Wels, *Command Control — or Military Justice?*, 24 N.Y.U.L.Q. REV. 263 (1949), a comprehensive exposition of this infirmity in military justice structure. Note, 62 HARV. L. REV. 1377 (1949). Many commanders have remained impartial in the performance of their duties as convening authorities. This section of the comment concerns those who have not been so conscientious.

³ *Hearings before a Subcommittee of the Committee on Armed Services on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. 76-77 (1949). The subcommittee hearing testimony concerning the proposed uniform code consisted of Senator Estes Kefauver, Chairman, and Senators Millard E. Tydings, Richard B. Russell, Leverett Saltonstall, and Wayne Morse.

⁴ *Hearings*, *supra* note 3, at 37

⁵ *Id.* at 84.

⁶ Two cases of command control in operation may be examined at this point. In *Beets v. Hunter*, 75 F. Supp. 825 (D. C. Kans. 1948), *rev'd on other grounds*, 180 F. 2d 101 (10th Cir. 1950), *cert. denied*, 339 U.S. 963, 70 Sup. Ct. 997 (1950),

Command control can be reduced by vesting in an independent Judge Advocate General's Corps those legal powers which have been most abused by the commander: the right to appoint general or special courts-martial, the right to appoint defense counsel, and the right to review the action of the courts.⁷

The illegal and indirect powers of the commander over the court grow naturally out of the commander's position. Court members are dependent upon his favor. Pressures may be exerted either manifestly or quite subtly, according to the personality of the commander. For example, courts have been told by the commander that his ordering a trial meant that he had already concluded the man was guilty.⁸ In other cases, commanders have requested courts to deliver the maximum sentence, so that the accused would be forced to look to his commanding officer for clemency.⁹ But often, clemency was not granted as the trial court expected it to be.

Such illegal influence is prohibited under Article 37¹⁰ of the Uniform Code and made an offense under Article 98: "Noncompliance with procedural rules." But it is extremely unlikely that these provisions will trap any offenders or that charges will be brought against commanding officers who violate them.¹¹ Commanders with any ingenuity or craft in such

an incompetent defense counsel went through the motions of defending an accused because he could not, as a soldier, refuse the assignment. The court said: "the court which tried this man was saturated with tyranny [the accused] could not have received due process of law in a trial in a court before men whose judgments did not belong to them, who had not the will nor the power to pass freely upon the guilt or innocence of this petitioner's offense It cannot stand the test of fundamental justice." *Id.* at 826.

In *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Claims 1947), Lieut. Shapiro, assigned defense counsel, showed, by a sensational device, that the defendant was improperly accused of rape. At the court-martial, he substituted for the accused another soldier, who was identified by prosecution witnesses as the attacker. When Shapiro revealed the deception, the real defendant was tried, convicted, and sentenced. Several days later, Shapiro was arrested. Within five hours after being served with charges of delaying the orderly progress of a court-martial, Shapiro was himself tried, convicted, and sentenced. The court called this a "flagrant case of military despotism almost complete denial of plaintiff's constitutional rights." *Id.* at 207.

⁷ The reforms mentioned are among those advocated by the Special Committee on Military Justice of the American Bar Association. *Hearings, supra* note 3, at 62.

⁸ *Hearings, supra* note 3, at 206, from a statement by Richard H. Wels, Chairman, Special Committee on Military Justice, New York County Lawyers' Association.

⁹ A. E. Farmer, Chairman, Committee on Military Law, War Veterans Bar Association, claims this is not a unique experience. *Hearings, supra* note 3, at 87

¹⁰ The article forbids the censure or reprimand of any member of a court-martial with respect to the findings or sentence adjudged by the court and provides that no person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial in the performance of its duties.

¹¹ Can you imagine " some outraged second lieutenant preferring charges against his command general " asks Franklin Riter, Officers' Reserve Corps. *Hearings, supra* note 3, at 174.

matters may easily dodge the prohibitions of the Uniform Code. A suggestion by the commander at the officers' mess that fewer men would be a.w.o.l. if an "example" were to be made, would hardly violate Article 37, nor would a gentle reminder that the time has come for marking the efficiency ratings of officers who are serving on a court-martial.

If the commanding officer were shorn of his legal powers to convene and appoint the court and review its findings, his illegal powers would decline.

MORE LAWYERS

Lawyers as Judges—The Law Officer

Under the Code, a "law officer" must sit on every general court-martial.¹² The law officer must be a lawyer, certified as qualified to perform the duties of his office by The Judge Advocate General of his branch of the service.¹³

It was the intent of the committee drafting the Code that the position of the law officer be analogous to that of a judge of a civilian court, while the remaining members of the court act as a jury.¹⁴ In accord with this view, the law officer's right to vote was taken away.¹⁵ Now the law officer is excluded from the closed court when it decides disputed issues.¹⁶ In addition to ruling on interlocutory questions of law,¹⁷ he is given the duty of instructing the court on elements of the offense and charging the court on presumption of innocence, effect of reasonable doubt of guilt, and burden of proof.¹⁸ These changes, together with the requirement that the appointment of a law officer to each general court be mandatory,¹⁹ have stirred considerable controversy.

¹² Under the old Articles of War, there was a provision for a "law member," but his status was substantially different. A.W.8,31, A MANUAL FOR COURTS-MARTIAL, U. S. ARMY, 1949. This manual, containing the amended articles of war, rules of procedure, and various forms and regulations, was established by Exec. Order No. 10020, Dec. 7, 1948, 13 F.R. 7519. It will hereinafter be cited as M.C.M., U. S. Army, 1949.

There are three classes of courts-martial; in the order of diminishing importance, they are: (1) General courts-martial, (2) Special courts-martial, and (3) Summary courts-martial. U.C.M.J. art. 16.

¹³ U.C.M.J. art. 26 (a).

¹⁴ *Hearings*, *supra* note 3, at 35.

¹⁵ U.C.M.J. art. 26 (b).

¹⁶ U.C.M.J. art. 39.

¹⁷ U.C.M.J. art. 51 (b) This article permits the law officer to rule upon all interlocutory questions arising during the proceedings, other than challenge. All rulings on any interlocutory question other than a motion for a finding of not guilty, or the accused's sanity, are to be final. On the question of challenges, see Note, 62 HARV. L. REV. 1377, 1380 (1949).

¹⁸ U.C.M.J. art. 51 (c)

¹⁹ U.C.M.J. art. 16, 26 (a).

Until the rule was changed in 1948,²⁰ a law officer was required on a general court-martial only when "available,"²¹ and his availability was a matter of discretion with his commanding officer.²² Despite argument that the new mandatory provision is too stringent—especially in time of war, when a certified law officer might be difficult to procure—the presence of a skilled lawyer sitting on every general court seems vitally necessary to a fair trial.

Under the old system, the law officer sat on the court as a member and had the right to vote, participating in all the discussions on both the law and the facts, in addition to ruling on interlocutory questions of law.²³ He was, in effect, a super-member, giving the rest of the court the benefit of his specialized legal training. In contrast, the present system achieves a closer similarity to civil trial proceedings.

Lawyers as Counsel

1. In Trial Courts.

As under the old Articles of War and the Articles for the Government of the Navy, counsel in court-martial trials are appointed by the authority convening the court-martial.²⁴

In general courts-martial, it is mandatory that there be appointed a trial counsel²⁵ and a defense counsel, who must be lawyers, although not necessarily serving as legal specialists in the armed services. Each counsel must be certified as qualified by The Judge Advocate General of his branch of service.²⁶ These requirements are new to military justice.²⁷

²⁰ 62 STAT. 629, 10 U.S.C. §1482 (1948). (A.W. 11, M.C.M., U.S. Army, 1949.)

²¹ 41 STAT. 788, 10 U.S.C. §1479 (Article 8 of the Articles of War). Prior to the 1948 amendments, the articles, together with rules of procedure, and incidental forms and regulations, are contained in A MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1928 (corrected to April 20, 1943), as established by Exec. Order No. 4773, Nov. 29, 1927.

²² *Hiatt v. Brown*, 339 U.S. 103, 70 Sup. Ct. 495 (1950); *Henry v. Hodges*, 76 F. Supp. 968 (S.D. N.Y. 1948), *rev'd on other grounds*, 171 F. 2d 401 (2d Cir. 1948).

²³ A.W. 8, 31, M.C.M., U.S. Army, 1949.

²⁴ U.C.M.J. art. 27; A.W. 11, M.C.M., U.S. Army, 1949; ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 26, 38, 64 (a) (1948).

²⁵ "Trial counsel" is the name given to the counsel for the prosecution. The term is ambiguous, since it might be thought to include counsel for both the defense and prosecution.

²⁶ U.C.M.J. art. 27 (b).

²⁷ Although A.W. 11, M.C.M., U.S. Army, 1949 was an advance over A.W. 11, M.C.M., U.S. Army, 1928, in requiring that counsel in general court-martial trials be members of The Judge Advocate General's Department or lawyers, if available, the availability provision was eliminated and the requirement was made mandatory by the Uniform Code in article 27 (b).

In special courts-martial, no change has been effected by the Code. The defense counsel need fulfil the above qualifications only when the prosecution counsel does.²⁸ The aim and effect is to give the accused no right except to be on an equal footing with the prosecution.²⁹

In both general and special courts, the accused may be represented by civilian counsel if he provides such counsel, or by military counsel of his own selection if "reasonably available."³⁰

2. In Appellate Courts.

Appellate counsel for both the government and the defense must have the same qualifications as prescribed for counsel in general court-martial trials.³¹ Appellate counsel are appointed by The Judge Advocate General, but the accused has the right to be represented by civilian counsel, if he provides such counsel.³²

In the review of his case before a board of review or the Court of Military Appeals, the accused must be represented by counsel when: (a) the United States is represented by counsel, or (b) the accused requests such representation, or (c) The Judge Advocate General has forwarded a case to the Court of Military Appeals.³³

There has been substantial opposition to the requirement of lawyers as counsel in court-martial cases, the chief reasons advanced being: (a) the tremendous number of courts-martial, especially in wartime, (b) the difficulty of procuring sufficient lawyers with resultant delay in disposition of cases, (c) the extreme simplicity of issues in the vast majority of courts-martial, obviating the need for lawyers, and (d) the presence of a trained and experienced law officer on the court, who may be requested to give information on difficult legal questions.³⁴

But (a) a multitude of trials does not excuse an inadequate defense in any one of them. (b) More legally trained personnel could be made

²⁸ U.C.M.J. art. 27 (c); A.W 11, M.C.M., U.S. Army, 1949.

²⁹ This is dangerous because special courts-martial have far-reaching powers. They are, for instance, authorized by Article 19 of the Uniform Code to award bad-conduct discharges. Such a discharge damages a man's reputation for life. Yet many of the safeguards which the code throws around general courts-martial are not available in special courts. Thus, not only may the prosecutor and defense counsel be persons without legal training, but also, law officers are not required on special courts.

³⁰ U.C.M.J. art. 38 (b) The 1948 amendment of the old articles of war also allowed the accused counsel of his own selection.

³¹ U.C.M.J. art. 70 (a), 27 (b)

³² U.C.M.J. art. 70 (a), (d)

³³ U.C.M.J. art. 70 (c)

³⁴ Statement of Maj. Gen. Thomas H. Green, The Judge Advocate General of the Army, *Hearings, supra* note 3, at 257-258.

available by a two-part program: reassignment of lawyers already in uniform from non-legal tasks to courts-martial work, and a system of commissioning and promotion which would attract civilians to military justice work. (c) Though an issue may be clear-cut, complex rules of procedure and evidence must be observed in deciding it. As a result, the best presentation of a case is made by a counsel who is a legal specialist. (d) The law officer is present only in general courts-martial. His assistance cannot be employed in lesser courts. Even in general courts, since he is expected to act as judge, he is not authorized to aid incompetent counsel.

It has been proposed that an office of chief defense counsel be created to control the appointment of all defense counsel.³⁵ This office would assume the powers presently in The Judge Advocate General to determine which cases to forward to the Court of Military Appeals. The right of the accused to furnish his own civilian counsel would not be denied.

Lawyers as Reviewers; Legal Aid to Convening Authority

Members of the boards of review, acting as a second reviewing agency and serving in the office of The Judge Advocate General, are required to be certified lawyers.³⁶

Staff judge advocates or legal officers aid the convening authority in his review of the case by checking the record and writing opinions thereon.³⁷ These officers, though not required by the Code to be lawyers, must be recommended by The Judge Advocate General to perform such specialized legal service.³⁸ In general courts-martial, they advise the convening authority regarding the charges, before the case is brought to trial.³⁹

Article 6 (b) of the Code provides for a direct, independent communication between a staff judge advocate or legal officer and the staff judge advocate or legal officer of a superior or subordinate command. This section was designed to make the staff legal officer more independent than before by releasing him from the old "chain of command" system of communication.

Since it follows that a wider use of legal assistance in court-martial cases

³⁵ This was suggested in a statement submitted to the Senate subcommittee by Professor Arthur J. Keeffe, of Cornell Law School, *Hearings, supra* note 3, at 253. This would be to avoid the influences of command control and to invigorate the appellate review system for the accused. As set up in the Uniform Code, The Judge Advocate General must act in two capacities in appealing cases. He controls the appointment of counsel on both sides of the case. To require him to be impartial is like asking a district attorney to appeal the case of a man he has just convicted.

³⁶ U.C.M.J. art. 66 (a).

³⁷ U.C.M.J. art. 61. Incongruously, the convening authority may ignore this opinion. SEN. REP. No. 486, 81st Cong., 1st Sess. 26 (1949).

³⁸ U.C.M.J. art. 6 (a).

³⁹ U.C.M.J. art. 34 (a).

should bring greater justice, the provisions discussed in the preceding three sections are steps in the right direction.

APPELLATE REVIEW⁴⁰

The Morgan Committee found a great divergence between Army and Navy appellate practices: the Army system was exactly spelled out; the Navy review agencies acted in an advisory capacity — their methods were quite informal. Articles 59 to 76 of the Uniform Code provide a single system of appellate review.⁴¹

First Review — By Convening Authority

After every trial by court-martial, the record is forwarded to the convening authority.⁴² If the record is that of a general court, the convening authority refers it to his staff judge advocate or legal officer, who writes an opinion, which becomes a part of the record.⁴³

In reviewing the record of any court-martial, the convening authority may find apparent errors or omissions or inconsistencies. If these mistakes can be rectified without material prejudice to the substantial rights of the accused, the convening authority may order the record returned to the court for revision. In acting upon the record, the convening authority has four courses which may be open to him: (a) He may approve the findings of guilty and the sentence or any part of it. (b) He may disapprove the findings and the sentence and dismiss the charges. (c) Disapproving the findings and the sentence, he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing before a new court. (d) Finally, if a specification before a court-martial was dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration.

The record may not be returned to the court to reconsider a finding of not guilty or to increase the severity of a sentence unless the sentence prescribed for the offense is mandatory.⁴⁴

By continuing to authorize an initial review by the convening authority, the Uniform Code has failed to eliminate a factor of command control.

⁴⁰ The history and development of courts-martial review is traced in Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 15 (1949).

⁴¹ Under Article 59 (a), a finding or sentence shall not be held incorrect on the ground of an error of law unless the error materially prejudices the rights of the accused. Article 59 (b) provides that any reviewing authority with power to approve a finding of guilty may approve, instead, so much of the finding as includes a lesser included offense. These provisions operate at all stages of the review.

⁴² U.C.M.J. art. 60.

⁴³ U.C.M.J. art. 61.

⁴⁴ The convening authority's powers of initial review are found in U.C.M.J. art. 62-64.

After the convening authority takes final action in a general court-martial, he sends the record to the appropriate Judge Advocate General's Department.⁴⁵ Records of special courts-martial which award a bad-conduct discharge are sent to a board of review in the office of The Judge Advocate General;⁴⁶ all other special and summary court records are sent up to be reviewed by a single officer in the legal department of the appropriate branch of service.⁴⁷

Second Review—By Board of Review

This review adopts Army procedure presently in effect.⁴⁸ The Judge Advocate General of each of the armed forces appoints one or more boards of review. Each board is made up of not less than three accredited lawyers, who may be either officers or civilians.⁴⁹

As under present practice, the board reviews facts and law, weighs the evidence, and judges the credibility of witnesses.⁵⁰ Like the first reviewing authority, this board may do nothing to increase a sentence, though it may order a rehearing under certain conditions.⁵¹ It may even dismiss the charges entirely. The board must consider every case in which the sentence affects a general or flag officer, cadet, or midshipman, or prescribes death, dismissal of an officer, dishonorable or bad-conduct discharge, or a year's confinement or more.⁵²

After a case has been reviewed by the board, The Judge Advocate

⁴⁵U.C.M.J. art. 65 (a). Only the Army has a separate Judge Advocate General's Corps. The problem of creating separate legal corps for Air and Navy has been postponed. SEN. REP. No. 486, 81st Cong., 1st Sess. 6 (1949). However, for each of these branches there is a Judge Advocate General, who will appoint boards of review, so that each force will have its own departmental reviewing authority.

⁴⁶U.C.M.J. art. 65 (b).

⁴⁷U.C.M.J. art. 65 (c).

⁴⁸Under the old articles, the boards of review constituted the final review—and then only in the more serious offenses. A.W. 50½, M.C.M., U.S. Army, 1928. They could consider law, but not facts. *Ibid.* The amendments of 1948 made boards of review intermediate reviewing agencies by placing above them a Judicial Council composed of three General officers. A.W. 50 (a), M.C.M., U.S. Army, 1949. In addition, both the boards of review and the Judicial Council were given authority to review facts as well as law. A.W. 50 (g), M.C.M., U.S. Army, 1949.

⁴⁹U.C.M.J. art. 66 (a). The requirement that board members be lawyers is new. The Coast Guard requested to be allowed to use its civilian personnel at this second review stage. It is not expected that the other branches will use civilians. SEN. REP. No. 486, 81st Cong., 1st Sess. 28 (1949).

⁵⁰U.C.M.J. art. 66 (c).

⁵¹U.C.M.J. art. 66 (d). If the board sets aside findings and sentence because of lack of sufficient supporting evidence, it may not order a rehearing.

⁵²U.C.M.J. art. 66 (b). It will consider cases involving lesser sentences if a prejudicial error of law has been discovered in the office of The Judge Advocate General, or if The Judge Advocate General so directs. U.C.M.J. art. 69.

General either sends it back to the convening authority, directing that action be taken as recommended by the board,⁵³ or he may—in his discretion—send it to the third reviewing authority.⁵⁴ He has no discretion in cases involving generals or flag officers or recommending the death sentence; these must go to the third review.

Third Review—By Court of Military Appeals

1. Nature of the Court.

The creation of the single Court of Military Appeals is the most notable innovation of the Uniform Code. Professor Morgan felt that it was a vital necessity; the public would continue to agitate for reform unless it believed the soldier was going to get the same kind of fair trial that he would get in the federal court system. The Court of Military Appeals gives the appearance of a federal reviewing authority.

This final appellate tribunal, sitting in Washington, D. C., will be composed of three civilian judges, who are appointed by the president, with the advice and consent of the Senate, for terms of fifteen years. Each judge must be a member of the bar of a federal court or of the highest court of a state; he receives the salary of a judge of the United States Court of Appeals and is eligible for reappointment.⁵⁵

2. Functions of the Court.

The three-judge court has no power to review issues of fact but considers questions of law only.⁵⁶ The drafters of the Uniform Code agreed that the final review of facts properly lay in the board of review, where military men probably would be more acquainted with a fact situation than would ordinary civilians. But cogent argument before the Senate subcommittee favored a review of facts by the Court of Military Appeals. Professor Keeffe, of Cornell Law School, pointed out that it is often difficult to tell what is a question of fact and what is a question of law.⁵⁷ Further, by refusing a review of facts to the three-judge court, the Code chains it to the facts in the record, while allowing an evaluation of facts by the convening authority and the military men on the board of review.⁵⁸ An appeal to the three-judge court on issues of law only has been com-

⁵³ U.C.M.J. art. 66 (e).

⁵⁴ U.C.M.J. art. 67 (b) (2).

⁵⁵ U.C.M.J. art. 67 (a) (1).

⁵⁶ U.C.M.J. art. 67 (d).

⁵⁷ *Hearings, supra* note 3, at 254.

⁵⁸ *Ibid.* In this respect, the Court of Military Appeals is more limited than the present Judicial Council of three General officers. See note 48, *supra*. But the prime objection is that *civilians* do not have an opportunity to review the facts; and this is just as true under present practice, with its Judicial Council of military men.

pared to an appeal to a federal court of appeals from a judgment based upon facts found by a jury: if there is any substantial evidence to support the decision of the court-martial, the Court of Military Appeals would not upset it on the weight of the evidence.⁶⁹

As the Code now stands, the Court of Military Appeals is the final arbiter on the law. Neither the president nor the Secretaries of the Departments of Army, Navy, and Air may upset the court's ruling on the law.⁶⁰ If the court sets aside the finding and sentence, it may order either a rehearing⁶¹ or that the case be dismissed. The court may return the record for further review by the board of review; otherwise—unless the president or the secretaries grant clemency—the record is returned to The Judge Advocate General, who instructs the convening authority to enforce the court's decision.⁶²

Section (g) of Article 67 provides for the second important activity of the court: an annual meeting with The Judge Advocates General to review the operation of the Code. The group will then report to Congress and the secretaries on the result of its studies and on data concerning cases pending and disposed of. It may recommend any desired changes, including amendments to the Code. It is believed that the annual report will keep Congress alert to the problems of military justice administration and the need for changes. The work of this group may be likened to that done by the Supreme Court Advisory Committee.

3. Cases before the Court.

It must not be assumed that every case of an accused—whose sentence may have been imposed under command control pressures—will be heard by the new Court of Military Appeals. There are only three classes of cases reviewable by the court.⁶³

(a) *Cases affecting a general or flag officer or awarding a death sentence.* There is an automatic appeal to the Court of Military Appeals in these cases—the only cases which *must* be brought before the court. If the accused is not a general or flag officer or is not under a sentence of death, he cannot be sure that his case will get to the three-judge court.

(b) *Cases passed by a board of review which The Judge Advocate General orders forwarded to the court.* Under this section, it is entirely

⁶⁹ *Hearings, supra* note 3, at 55, 174.

⁶⁰ *Hearings, supra* note 3, at 54. The president and the secretaries, though without specific appellate powers as to guilt or innocence, do retain their powers of clemency in certain cases: the president, in cases involving death or a general or flag officer; the secretaries, in cases involving dismissal of officers. U.C.M.J. art. 71.

⁶¹ Except where the setting aside is based on lack of sufficient evidence in the record to support the findings. U.C.M.J. art. 67 (e).

⁶² U.C.M.J. art. 67 (f).

⁶³ The three classes are set out in U.C.M.J. art. 67 (b).

discretionary with The Judge Advocate General whether he shall forward any record already reviewed by a board of review in his office. If the record is referred to it, the court will consider only the issues raised by The Judge Advocate General.

(c) *Cases reviewed upon petition of the accused.* After being notified of the decision of a board of review, the accused has thirty days in which to petition the court for review.⁶⁴ This may be compared to a petition of certiorari for review on questions of law: an accused has no guarantee that it will be granted. There is danger that through ignorance or error, many defendants will not take advantage of this opportunity. Review for every case, equally and automatically, before a top civilian court, has been urged.⁶⁵ This would seem to offer a soldier greater safeguards than are ordinarily provided a civilian. But it must be remembered that no civilian has counsel, judge, and jury appointed by a single authority when he is tried for a criminal offense. Since it may be impractical however, to provide for an automatic appeal for all cases, the civilian court of three judges must be trusted to make rules regarding petitions and appeals which are simple, clear, and equitable.

REFORMS AND RELAPSES

Before assessing the overall value of the new Code, it is necessary to point out certain provisions not previously mentioned. Though important, these sections are not of sufficient scope to demand broader treatment.

Double Jeopardy

When tried more than once by the military for the same act, the accused may employ double jeopardy as a defense.⁶⁶ The Uniform Code clearly prohibits two trials for the same offense and defines a "trial" that may be held to preclude a subsequent trial. Article 44 (c) states that where a proceeding is dismissed by order of the convening authority or terminated on motion of the prosecution, and where the interruption is through no fault of the accused, it is considered a trial; the accused cannot be tried again. The Supreme Court, in *Wade v. Hunter*,⁶⁷ established the rule that such an interrupted proceeding would not be considered a trial when the dismissal was because of urgent necessity.⁶⁸ Article 44 (c) changes this rule. A dismissed proceeding is now considered a trial, and urgent

⁶⁴ U.C.M.J. art. 67 (c)

⁶⁵ Professor Keeffe, *Hearings, supra* note 3, at 252.

⁶⁶ U.C.M.J. art. 44 (a)

⁶⁷ 336 U.S. 684, 69 Sup. Ct. 834 (1949), *rehearing denied*, 337 U.S. 921, 69 Sup. Ct. 1152 (1949)

⁶⁸ The rule was formulated in *United States v. Perez*, 9 Wheat. 579 (U.S. 1824). The Wade case, in deciding whether court-martial action runs counter to the Fifth Amendment's provision against double jeopardy, applied the test of the Perez case

necessity is no longer a justification for dismissal. The difficulty of determining the presence of urgent necessity is thereby avoided, and any possible pressure that the convening authority might exert on the accused, by dismissing one trial and ordering another, is eliminated.

Pretrial Investigation

A pretrial investigation is provided by the Uniform Code.⁶⁹ Previously, there was some question whether the requirement for such investigation was mandatory or directory.⁷⁰ The issue was resolved in *Humphrey v. Smith*,⁷¹ when the Supreme Court decided that the requirements for pretrial investigation were directory only. The new Code adopts the decision of the *Humphrey* case.⁷²

Replacement of Members of a Court

In civilian trials, it is not the general practice to replace incapacitated jurors with substitutes who will be familiarized with the case by a reading of the recorded testimony. Yet, this is exactly the procedure authorized under Article 29. Since the demeanor of a witness while actually testifying on the stand is a useful factor in determining his credibility, and it is impossible to indicate this on the record, the practice set out in Article 29 is to be condemned.⁷³

Enlisted Men on Courts-Martial

Under Article 25 (c), enlisted men may serve on general and special courts when the accused is an enlisted man, and he requests, in writing, their presence. Although theoretically desirable, the provision actually may not operate as beneficially as intended. It is likely that the enlisted men appointed by their commanding officer to the court will be those eager to

to military trials. Application of the Fifth Amendment's double jeopardy provisions has been considered chiefly in civil, rather than military, court proceedings. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 58 Sup. Ct. 149 (1947); *Kepner v. United States*, 195 U.S. 100, 24 Sup. Ct. 797 (1904); *McCarthy v. Zerbst*, 85 F. 2d 640 (10th Cir. 1936).

⁶⁹ At this investigation, the accused is to be advised of the charges against him, to be given full opportunity to cross-examine witnesses against him and to present anything he desires in his own behalf. U.C.M.J. art. 32. See Comment, 34 IA. L. REV. 686 (1949).

⁷⁰ If mandatory, failure to provide such investigation would prevent any court-martial from acquiring jurisdiction to try the case, and if the case were tried, the finding of the court-martial would be null and void. The accused could then employ the writ of habeas corpus in the federal courts to obtain freedom. If directory, the accused would have no such recourse, and his appeal would be limited to regular channels. See Note, 18 GEO. WASH. L. REV. 67 (1949).

⁷¹ 336 U.S. 695, 69 Sup. Ct. 830 (1949), *rehearing denied*, 337 U.S. 934, 69 Sup. Ct. 1492 (1949).

⁷² U.C.M.J. art. 32 (d).

⁷³ It will be noted from the section on Appellate Review, that the board of review also is authorized to weigh evidence and judge credibility of witnesses from a reading of the record. Criticism of the board's power to weigh evidence however, is not

prove as responsible disciplinarians as their superiors. Further, enlisted men will serve upon request only when they are available.⁷⁴

Extension of Jurisdiction

The Code extends the jurisdiction of military courts to certain classes of persons not previously subjected thereto. Among those now subject to court-martial action are: discharged persons who are charged with having committed, while subject to the Code, a serious offense against the Code;⁷⁵ and reserve personnel while on inactive duty training authorized by voluntarily accepted written orders subjecting them to the Code.⁷⁶

Punitive Articles

With some exceptions, the punitive articles have been improved by redefinition of offenses and simplification of language. Yet certain articles remain to be criticized.

The broad language in Articles 104 and 106 is open to a construction bringing any civilian within courts-martial jurisdiction for "aiding the enemy" and "spying." Whereas other punitive articles are worded: "Any person subject to this code who . . .," Articles 104 and 106 commence by stating: "Any persons who . . .,"⁷⁷ thereby not limiting their application to those classes of persons which Articles 2 and 3 painstakingly enumerate as being subject to the Code. "Any person" could include civilians, the majority of whom were not intended by these jurisdictional provisions to be made subject, in general, to punishment by military courts. Despite this, and despite the established rule that civilians are not to be tried by military courts—even in time of war—when the civil courts are open to them,⁷⁸ Articles 104 and 106 conceivably could be construed to allow such civilians to be tried by courts-martial in wartime.

justified since requiring all the witnesses to appear before the board would be impracticable and would be just another trial, to which the accused is not entitled. In the *original* trial however, the accused is entitled to a guarantee that each and every member of the court shall have the opportunity of observing all the witnesses.

⁷⁴ " . . . unless eligible enlisted persons cannot be obtained on account of physical conditions or military exigencies." U.C.M.J. art. 25 (c) (1) It is difficult to visualize a case in which an officer would be forced to serve where an enlisted man is not available, since enlisted men are generally more plentiful than officers. If a bona fide reason for this provision exists, it eludes the writers.

⁷⁵ U.C.M.J. art. 3 (a) The offense must be one punishable by confinement of five years or more and for which the person cannot be tried in the federal, state, territorial, or District of Columbia courts. *Ibid.*

⁷⁶ U.C.M.J. art. 2 (3)

⁷⁷ The attention of the Senate subcommittee was called to the wording of Articles 104 and 106. *Hearings, supra* note 3, at 127, 254. Query, by declining to change the wording, did the subcommittee intend that Articles 104 and 106 should apply to civilians?

⁷⁸ *Ex parte Milligan*, 4 Wall. 2 (U.S. 1866), established the rule that when the civil courts are open, civilians may not be tried by military courts. However, the Uniform

Article 15 (a) (2) (F), which preserves as a part of the disciplinary power of the commanding officer of a ship, the authority to confine a man on bread and water or reduced rations for three days, is indefensible. Such harsh punishment is not necessary to keep a ship at sea, with its limited manpower, in operation; extra duty will do as well. This section is an anachronism and should be removed.

Miscellany

Reciprocal jurisdiction is found in Article 17 of the Code, which gives each branch of service, subject to regulation by the president, courts-martial jurisdiction over all persons subject to the Code. However, intermediate review is carried out by the branch of service of which the accused is a member. Modern warfare, with its joint operations among the services, makes this practice necessary as a practical convenience.

The Uniform Code provides that any person sentenced to confinement by a court-martial or military tribunal may now be confined in any penal or correctional institution under the control of the United States.⁷⁹ This includes federal penitentiaries and jails. This is a distinct improvement in handling military prisoners, increasing the possibilities of their rehabilitation, and releasing the strain on inadequate military prisons.

CONCLUSION

As the first attempt at establishing a single court-martial system for all departments of the armed forces, the Uniform Code cannot be expected to prove a panacea for all the ills of military justice. It preserves the commanding officer's grip over the trials of his men. Top reviewing agencies remain only remotely accessible to defendants not under sentence of death. Yet, certain hard-won reforms are incorporated. More expert legal aid is guaranteed the accused. There has been created a supreme civilian reviewing authority, which holds the greatest promise of liberalizing appeal techniques in the future.

The Code is written in understandable, non-technical language. There should be no difficulty in interpreting most of its sections. But in the final analysis, its equitable operation depends largely upon the character of the men who will administer it: the lawyers acting as counsel and judges, the lawyers on the boards of review, and the lawyers on the Court of Military Appeals.

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Code is a congressional enactment, and Articles 104 and 106, being a part thereof, might very well destroy the doctrine of the Milligan case, making it inapplicable on the basis that in the Milligan case, there was no Act of Congress vesting in a military commission the power to try the offense there involved.

⁷⁹ U.C.M.J. art. 58.