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FOREWORD: COMMENTS BY THE COURT

Robert E. Quinn*

THE COURT'S RESPONSIBILITY

The United States Court of Military Appeals has been referred to as the "most vital element" in the reformation and unification of military criminal law brought about by the Uniform Code of Military Justice. It represents a further extension of civilian control over the military — a concept long deemed vital to the American framework of democratic government.

The Court is not faced with an easy task, and no one is more aware of this than the judges themselves. Like all institutions established as a result of reform movements, its activities are subject to close public scrutiny. The work of the Court is being analyzed on the one hand by segments of the civilian bar who have acquired a distrust of the military courts-martial system; it is being carefully watched on the other by those of the military who were apprehensive of its existence from the beginning. It is almost axiomatic that what pleases one group will almost certainly not please the other.

It should not be concluded, however, that everyone interested in the Court's work can be classified as being basically motivated either for or against the Court. There are, I am sure, many who feel that its establishment was a necessary step in the improvement of the scheme of military justice, but who will base their final judgment upon its work unswayed by preconceived prejudices. It is my hope that the legal journals will be numbered among this group and that they will do for our Court what they have long done for the American judiciary — provide an interested but critical forum for analysis of its work.

Everyone, I am sure, realizes that the proper operation of the Uniform Code of Military Justice does not depend solely upon this Court. The cases considered here constitute but a small fraction of the total. The most that we can do is mark out the boundaries and build the framework around the foundation provided by Congress in the Uni-

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form Code of Military Justice. Although America prides itself on its government by laws, not men, the laws are of little avail if they are not properly applied at the point of realistic contact with those governed. In the military system, if officers in positions of responsibility, courts-martial and military reviewing authorities do not adhere to the spirit of the Code, then the opinions of this Court are likely to remain monuments only to the good intentions of the judges writing them.

This concept of practicality must continue to remain a guiding influence at the elbow of the judges. Our opinions must, by the very nature of the system and our place in it, have importance far beyond the fate of the individual case. They must be understood and applied by officers in the field and at sea who have primary responsibility under the Code. And these officers — along with all who follow the Court's progress — must keep in mind that we are just as concerned with the effect a decision will have upon thousands of servicemen in the future as we are with the outcome of the individual case. To say this is not, of course, to detract from the importance of doing exact justice in the individual case. It is to say that facts are determined in the trial forum, whereas legal principles designed to endure past today are enunciated by an appellate court.

I emphasize this point because I feel that there is even more danger in military than in civil law of elevating the transient over the lasting. It must be remembered, also, that ours is a criminal — not a civil court. Life and liberty are at stake. To those who would, impatiently, criticize the decision of the Court that may seem to be based on technicalities of the law, I would offer the reminder that the history of Anglo-American criminal law is largely one of erecting safeguards to protect the rights and freedom of the individual who has the power of society and the state arrayed against him. And what the uncritical observer may deem an unimportant technicality may well be based upon a sound reason of law well designed to help balance the scales of justice. We feel quite strongly — and, I think, quite rightfully — that we want no part of any system which deems punishment of the guilty more important than protection of the innocent.

It is my hope that the bar, individually and through its legal journals, will follow closely the work of this Court. They can perform a most valuable function in weighing individual cases against the dichotomatic concept of military justice and tell the public, the services and us, the judges, whether we are performing properly our task of enunciating principles worthy of existence in this relatively new field of law.

George W. Latimer*

"GOOD CAUSE" IN PETITIONS FOR REVIEW

The Uniform Code of Military Justice provides for three classes of cases which, after having been affirmed by a Board of Review, must be considered by the United States Court of Military Appeals. These are: (1) cases in which the sentence affects a general or flag officer or extends to death; (2) cases which The Judge Advocates General order forwarded to the Court of Military Appeals for review; and (3) cases which, upon petition of the accused and on good cause shown, the Court of Military Appeals has ordered a hearing. The cases falling within the first two categories are made the subject of mandatory grant but those in the third category permit the Court some discretion in determining whether to accept an appeal in the particular case because "good cause" for review has been presented. It is in this latter area of the Court's activities that I direct this article.

As do other appellate courts which exercise discretion in reviewing convictions and granting oral arguments on the merits, we look at the entire record of the case to determine whether there is good cause for us to proceed further than the preliminary review required by the original petition. If we conclude there is merit to the contentions raised, or that some good purpose will be served by publishing our views, we authorize further proceedings, but, when we do not believe good cause has been shown, or that nothing of value will be gained by more adequate consideration, we deny the petition. Our reasons for denial are not disclosed because we have adopted the procedure of disposing of denied petitions by form order. This procedure has caused a certain amount of conjecture and speculation about, and—sometimes — criticism concerning, the assumed reasons for the denial. Some of the criticism reaching our ears in this regard is understandable. The present system is in its infancy and counsel are, for the most part, required to represent the accused. After they have worked diligently on what appear to be the best available issues shown by the record, with few precedents from the Court to use as a guide, they have a tendency to become discouraged when their contentions are summarily disposed of by an unexplained order of denial. But it must be remembered that a summary disposition of a petition does not indicate a lack of appreciation on the part of the judges of the issues involved or the zeal with which they are advanced. It merely indicates that when the record has been considered in its entirety, at least two members of the Court do not believe good cause for proceeding further has been established.

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Even at the risk of plagiarizing what other courts and writers have stated, it should be made clear that the reasons which prompt the Court to deny petitions for review are not withheld for any reasons of secrecy. Other well-known reasons compel the procedure adopted. As a practical matter, the number of petitions which must be processed by the Court prohibits disposition of each by any method more acceptable than the one in use. A brief reference to other articles published in this Symposium showing the number of petitions filed with and processed by the Court should convince even the most skeptical that time does not permit composing written opinions, regardless of length, except in the most important cases. Brevity in writing does not guarantee clarity or accuracy and short opinions may require hours of work. The additional burden of writing short form opinions setting forth the Court's reasons for denial in sufficient detail to help the services, counsel or the litigants, could not be reasonably expected from three Judges.

The large number of petitions for grants of review which were denied by the Court should not suggest that those accused involved vainly sought review of their convictions. Because the members of the Court believe that a denial of a petition for review is a final decision in so far as an accused is concerned, and that it affects his life, liberty and property as effectively as does a written decision rendered by the Court, care is exercised in originally reviewing the record for error which might materially affect his substantial rights. But the degree of care in the review has little relationship to the presence or absence of a short form opinion.

The suggestion has been made that in cases where the issues involved are important but a grant is not ordered, the Court should relax its rule and adopt the policy of noting, with some detail, the reasons for its denial. Such a procedure might be desirable unless other matters of more importance have to be sacrificed for that purpose. In any appellate system compromises will be necessary and the value of the proposed reform is found to be largely imaginary when consideration is given to the fact that there are two ways now being used which, for the most part, accomplish the desired result. First, if The Judge Advocate General of any service considers that a case involves questions which have real merit he can certify the record to the Court setting out the issues he concludes should be settled and the Court must then answer the questions certified. Second, if the question is of real importance, and the record is not certified, the Court usually grants the petition as the Judges are interested in publishing their views on matters of substance so that a substantial body of military law will be early developed.

Since the reasons for the denial of petitions are usually assumed by

counsel, and since some of the cases denied seem to be similar to some of those granted, there is an undercurrent of belief that we are inconsistent. Consistency is not always possible but we wonder if this belief is not founded on a failure to consider properly the criteria by which good cause is measured. It involves many factors and the right to make a determination of the merits of a case includes the right to weigh one factor and determine its relationship to the others. By way of illustration, an error of law in a case where there is only one specification might require a grant with a subsequent reversal while the same error in a case involving a dozen different specifications might be of so little relative importance that a denial would be in order. Again, an erroneous instruction prejudicial in one factual background might not be harmful in another.

In some instances we grant reviews with some reservations concerning good cause. This is done because of the revolutionary changes wrought by the new Code and a desire on the part of the Judges to reduce the areas of conflict between the new and the old. One of the basic reasons for the Act, as shown by the title given it, was to promote uniformity of legal principles and procedures. In the framework of the present military judicial system the Court alone has jurisdiction of offenses committed by personnel of all branches of the Armed Services. Since its powers are judicial, the only way in which it can mark the path for the inferior tribunals to follow is by publishing concepts and principles in judicial opinions. The success of the new uniform system of military justice requires that a proper foundation of legal guides for trial and other appellate agencies in all services be established without undue delay. Conflicting interpretations of the Code must be reduced and eventually banished. The reasons which guide the Court to select certain test cases for this purpose and reject others are not always clear to persons who are following the Court's activities. In furtherance of this particular policy many considerations may be influential, some may be compelling. Pertinent matters both in and out of the record may be considered. In accepting one petition, issues can be considered and in other cases involving similar questions review need not be granted. Some petitions are selected for a grant because they clearly present issues which are preferred as a vehicle for the Court's expression of its views. The facts of one case may form a better foundation for the expression and explanation of a concept than those in another case. In many instances the petitions granted pursuant to this policy are disposed of by opinions which fix a rule or establish a principle by affirming the conviction of the accused. The principle has been developed and publicized even though good cause may have been found to be absent.

These rather lengthy explanations are made to show clearly to mem-

bers of the bar who may appear before the Court and to counsel who may practice before military tribunals that no conclusion as to the Court's position on a legal principle may be drawn from its denial of a petition for review, except that good cause for review has not been shown. A denial does not carry the implication that the Court finds little or no merit in all of the legal principles set forth in the petition. The most that can be gleaned from a refusal to grant is that, cast in the background of the facts of the particular case and viewed in the light of procedure adopted, error which is of sufficient importance to prejudice the substantial rights of the accused is not present. Moreover, a denial of a petition can not be interpreted as an affirmance or blanket endorsement of all legal principles which may have been announced in the decision of the board of review.

Paul W. Brosman*

THE COURT: FREER THAN MOST

I.

One of the significant aspects of the United States Court of Military Appeals — certainly one of more than passing interest to its members — appears to have been neglected by persons who have sought to evaluate the body and its potentiality for usefulness. Certainly if its affairs are conducted with wisdom and balance, it can accomplish much of value to the several armed services and their expanding personnel by means of the evolution and adoption of sound principles for specific application in the military justice scene, and through the further development of a genuinely professional attitude in service law administration in general, and that of its criminal branch in particular. This is, of course, the tribunal's primary mission — plain and obvious — in comparison with which all others must accept subordinate roles. It is also the one, I am sure, recognized most distinctly, and contemplated with greatest steadfastness, by the Committee which drafted the Uniform Code and the Congress which made it law.

There is, however, a further opportunity available to the Court's bench — one of infinitely broader implications, yet wholly by-productive in character, and unrelated directly to its relatively narrow subject matter jurisdiction. What I have in mind here has to do with the fair and challenging field it enjoys for enlightened and constructive juridical action as the harvest of its very infancy, and the strikingly unique character of its mandate.

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II.

Authoritative sources developed during congressional hearings on the Code indicate clearly that the Morgan Committee's several drafts were aimed at—and the statute, as adopted, reflects — a thoughtful balancing of the two essential ingredients of military justice: the *justice* element and the *military* element. Within the first of these terms, of course, I mean to include those safeguards and other legal values which are a part of informed criminal law administration in the civilian community. And by use of the second I mean principally to comprehend acute considerations of discipline in an abnormal social situation, limitations growing out of the burdens, realities and necessities of military operations, and the like. The scales of this process constitute a recognizable and direct legacy to the Court of Military Appeals—and thus its members are enjoined to select from among the juristic principles of civilian forums only those which it believes — in the exercise of the very fullest judicial responsibility — to be consonant with the needs of justice as administered against a military background. This does not at all mean that they are to make short shrift of civilian legal doctrine. Quite the reverse. Certainly the civilian rule must ever furnish the guide in the usual case. It does connote, however, that the judges of the Court of Military Appeals — in this respect at any rate — enjoy greater freedom to choose than any I know.

III.

Thus far I have been speaking of the delicate task of option between civilian legal principles, on the one hand, and requirements peculiar to the military, on the other. However, the Court's freedom of choice does not end with the limits of this important area. Turning to a consideration of its position as a federal tribunal of appellate jurisdiction, we must recognize that it is a member of no civilian judicial hierarchy. As a *national* agency of adjudication, it is perforce free from the compulsive — and frequently noxious — influence of narrow, timorous and precedent-ridden state systems. Moreover, and by the same token, as well as by virtue of its assimilated status in the federal judicial scheme, it is similarly untrammeled by strict stare decisis even within that organization — save as the Supreme Court may enter the picture. True it is that the system of service jurisprudence — of which the Court of Military Appeals is a part — is explicitly remitted to federal doctrine, substantive and procedural, for guidance. However, at the same time it is undeniably accurate to say that the directive to this effect is phrased in terms of "as near as may be." It could not with logic be stated in others. The net of all this, as I see it, is that this Court is freer than any in the land—save again the Supreme Court—to find its law where it will, to seek, newfledged and sole, for *principle,* un-

hampered by the limiting crop of the years. This is not to suggest, of course, that the new tribunal is licensed to act in an unjudicial manner. Indeed, it *must* look for its law in the *sources* of law — but it may do so, I believe, relatively unburdened by precedents demonstrated by the test of time and experience to be unrealistic, ill-devised, or outmoded.

IV.

Will the Court seize upon this happy and challenging opportunity to construct — not, by all means, casually and experimentally — but soberly, selectively and accountably? In justice, it is much too early to evaluate the work of its judges in light of this inquiry. However, there are more than token indications in their substantial judicial product that the tribunal's obligations will be met with responsibility and perception. Let us hope that the future will establish conclusively the validity of this hopeful prophecy.

All of this suggests the presence of multiple reasons for the encouraging interest of the *Vanderbilt Law Review* in the Uniform Code of Military Justice and the Court of Military Appeals. Its alert and generous patronage must indeed be appreciated by those who share a concern for the enlightened administration of military criminal law. Others — interested primarily in wider aspects of the judicial process — may also have occasion for gratitude.