Vanderbilt Law Review

Volume 6
Issue 2 *Issue 2 - A Symposium on Military Justice*

Article 2

2-1953

The Background of the Uniform Code of Military Justice

Edmund M. Morgan

THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE

EDMUND M. MORGAN*

The Articles of War and the Articles for the Government of the Navy have always constituted the code of criminal law and criminal procedure for the Armed Forces. In contrast to the law governing civilians, the punishments imposable are not specified in the Code but are left to be fixed by the military authorities, except that the later codes do not authorize punishment by death save for specifically designated offenses. The system also provides for summary punishment for minor infractions and a series of courts — a general court having power to try all offenses, a special court with limited power to impose punishment and a so-called summary or deck court with very limited powers. Unlike the civilian courts, each of which has a permanent judge or group of judges, the court-martial is appointed by military authorities to try a designated case or series of cases. In this respect it resembles the civilian jury rather than the civilian court, but its members under the orthodox system perform the functions of both judge and jury in determining guilt and fixing sentences.

When Thomas Jefferson and John Adams were made members of a committee to revise the military code of 1775, Adams records: "There was extant one system of articles of war, which had carried two empires to the head of command, the Roman and the British, for the British Articles of War were only a literal translation of the Roman. . . . I was therefore for reporting the British articles *totidem verbis*. . . . The British articles were accordingly reported."[1] These were adopted in 1776 and subsequent legislation made no fundamental change. Even the Articles enacted in 1916 were only a rearrangement and reclassification without much alteration in substance.[2]

The early American Naval Articles were also the work of John Adams and were largely the British Naval Articles of 1749.[3] The Articles for the Government of the Navy, enacted in 1862 and amended on half a dozen occasions, were originally and continued to be in theory and substance fundamentally the British articles.

The theory of the military establishment had been, during World

* Frank C. Rand Professor of Law, Vanderbilt University; Chairman of the Committee of the Secretary of Defense which drafted the Uniform Code of Military Justice.

1. 3 ADAMS, WORKS OF JOHN ADAMS 93 (1850).

2. Gen. E. H. Crowder in *Hearings before Committee on Military Affairs on H. R. 23628*, 62d Cong., 2d Sess. 16 (1912); Comparative Print showing Sen. 3191, etc., 64th Cong., 1st Sess. (1915), Senate Committee Print. For a description of the principal changes, see A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY AND OTHER PROCEDURE UNDER MILITARY LAW IX-XIV (1916).

3. See 96 CONG. REC. 1381 (1950) for Senator Kefauver's brief history of legislation prior to the Elston Act.

War I was, and, if the conservatives of the regular service had their way, would still be, that courts-martial "are in fact simply *instrumentalities of the executive power,* provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."[4] This means that the finding and sentence of a court-martial constitute only advice to the commanding officer as to what should be done to an accused for an alleged offense, and that the entire machinery for review by higher authority is set up merely to furnish trustworthy advice to the commander-in-chief or the officer to whom he has delegated the disciplinary function. This concept is based upon military history and particularly upon a decision of the Supreme Court in 1857 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.[5] The militarists neglect the implications of a pronouncement of the same Court thirty years later:

> "The whole proceeding from its inception is judicial. The trial, findings, and sentence are the solemn acts 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.*"[6]

The provisions for review as contained in the 1916 revision of the Articles of War reflect the military theory. No sentence or finding of a court-martial could be put into effect until approved by the authority which appointed the court. The power to approve included the power to disapprove and to send back to the court a finding of not guilty or a sentence deemed too lenient. Confirmation of the action of the appointing authority by the President was required where the sentence affected a general officer, or included dismissal of an officer, death, or dishonorable discharge, except that in time of war a sentence of dismissal, or a sentence of death for murder, rape, mutiny, desertion, or spying could be approved or confirmed by the commanding officer in the field. And the officer competent to order execution of such sentence of death or dismissal could suspend sentence until the pleasure of the President was known.

4. 1 WINTHROP, MILITARY LAW 53 (1886).
5. Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838 (U.S. 1857).
6. Runkle v. United States, 122 U.S. 543, 558, 7 Sup. Ct. 1141, 30 L. Ed. 1167 (1887).

It will be observed that there was no requirement of participation in the process of review by any legal officer. In practice the appointing authority was advised by a judge advocate as was the President, whose adviser was the Judge Advocate General. Section 1199 of the United States Revised Statutes of 1878 provided that "the Judge Advocate General shall receive, revise and cause to be recorded the proceedings of all courts martial, courts of inquiry and military commissions." The legislative history of this act furnishes good grounds for arguing that the Bureau of Military Justice, which was later merged in the Judge Advocate General's Department, was intended to be a court of military appeals with power in the Judge Advocate General to reverse or modify the findings and sentence of courts martial for errors of law.[7] But from the outset, the War Department interpreted the statute as conferring the power only to advise upon matters of substance and the power to correct only mere clerical errors. In 1918 General Samuel T. Ansell challenged this interpretation and thereby came into sharp conflict with the Chief of Staff. The controversy was submitted to Secretary Baker, who after consideration of the conflicting arguments, sustained the War Department interpretation.[8]

The *Tapalina* case[9] is a striking example of what could and sometimes did happen under this regime. Tapalina, a military policeman charged with burglary, was found not guilty by a general court-martial. The appointing authority sent the case back for revision with a communication which amounted to an argument that the evidence warranted a finding of guilty. The court on revision found the accused guilty. The sentence was dishonorable discharge and five years confinement in the penitentiary. The reviewing officer in the Judge Advocate General's office wrote: "After a careful consideration of the evidence this office is firmly convinced of the absolute innocence of the accused. The evidence against him is wholly inconclusive, and his statements have a ring of sincerity which convinces the reader that he speaks the truth." This was sent to the appointing authority for his consideration, with a reminder that the guilt of an accused must be established beyond reasonable doubt, that the Judge Advocate General's office had grave doubts of Tapalina's guilt and that the court's first finding showed that it shared this doubt. Nevertheless, the appointing authority approved the conviction. This was publicly

7. See brief of Col. Eugene Wambaugh (Professor of Law in Harvard University) in *Hearings before a Subcommittee on Military Affairs on Sen. 64*, 66th Cong., 1st Sess. 86-88 (1919). This is a lengthy report giving verbatim the testimony taken on Ansell's proposed bill, usually called the Chamberlain Bill.

8. *Hearings, supra* note 7, at 90-91.

9. See Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52, 64 n.43 (1919).

justified in 1919 by General Crowder in an official publication.[10] But on Feburary 12, 1919, upon an application for clemency for Tapalina, General Crowder made the following indorsement:

> "While it cannot be said that there is no evidence upon which the findings of guilty can be based, this office is strongly of the opinion that an injustice may have been done to this man, and that it should be righted as far as possible. It will be noted that Mr. Flagler, field director of the Red Cross at Camp Gordon, comments upon the poor reputation of one of the principal witnesses against Tapalina. It is recommended that the unexecuted portion of the sentence in this case be remitted, and that the prisoner be released from confinement and restored to duty upon his written application to that end."[11]

Shortly after the armistice of November 11, 1918, the controversy between General Ansell and the Chief of Staff broke into the open. Ansell's vigorous protests within the Department as well as public reaction brought directives in the form of amendments to the Court-Martial Manual which corrected some of the most flagrant defects to the system. Secretary Baker, in an attempt to render Ansell harmless, detailed him to draft a revision of the Articles of War. His draft was introduced in the Senate by Senator Chamberlain and in the House by Congressman Royal Johnson, but not at the request or with the sanction of the War Department, which in fact strongly opposed most of the provisions. Ansell's public condemnation of the system and the complaints by service men and their families led to the appointment of a clemency committee in the office of the Judge Advocate General of which Ansell was at first chairman, and to an investigation by a committee of the American Bar Association and others. Extensive hearings were held on the Chamberlain Bill. The Ansell draft was badly mutilated but the substance of some of its provisions protecting the rights of an accused were embodied in the Act of June 4, 1920, which, without further amendment of any importance, was in force during World War II.

While all this was agitating the Army, the Navy was doing almost nothing to improve its antiquated system. During World War I, it was the boast of the Naval Judge Advocate General office that it had no lawyer on its staff. But during World War II the Navy found much use for legally trained men in a number of its departments and some use for them in the office of its Judge Advocate General. And in that war there were in the naval service so many more men, and the Navy was relatively so much more active and important, than in World War I that its administration of military justice could not escape public

10. MILITARY JUSTICE DURING THE WAR 9, 10 (1919) (Government Printing Office).
11. Note 9 *supra.*

attention. This was doubly or trebly true of the Army with its puzzling policy as to public relations concerning its treatment of military offenders. In some instances it actually promoted publicity of convictions in the communities in which the accused had lived and was well-known. Furthermore its officers who appointed courts-martial and defense counsel failed to recognize that in many of its courts-martial they were lawyers, men who were trained to fight for the rights of an accused and who resented any attempt to influence their action as counsel and who condemned any effort to control a court as poisoning the very source of justice.

The result was a much louder public clamor and a series of investigations and reports by committees of civilians, sponsored by the Army and the Navy, as well as a review of cases of men still serving sentences. Proposed Articles of War were drafted and submitted by representatives of the Army and proposed Articles for the Government of the Navy by representatives of the Navy. On the former, hearings were had and a proposed act differing widely from that submitted was whipped into form. As to the Navy proposal, hearings were delayed. There seems to have been some sort of agreement that nothing should be submitted to the 80th Congress, because the problems of both services should be considered together. But the Elston bill was unexpectedly offered as an amendment to the National Defense Act and was enacted by both Houses. To what extent it applied to the Air Force, which then had become a separate service, was debatable, but the question was never raised calling for official decision. Before this act went into effect and while the Articles for the Government of the Navy and the Disciplinary Laws of the Coast Guard remained as they had been during World War II, Secretary Forrestal appointed a committee to draft a Uniform Code of Military Justice designed to govern all branches of the service.

The Forrestal Committee had as executive secretary Mr. Felix E. Larkin, then Assistant General Counsel of the Secretary of Defense, who headed a working staff of 15 lawyers composed of officers and representatives of the Army, Navy, Marine Corps and Coast Guard, including five civilian lawyers. This staff processed all material, and the committee worked over every provision in detail. The Code, as the Committee reported to the Secretary, is a result of intensive study of (1) the law and practices of the several branches of the service, (2) the complaints made against the structure and operation of the military tribunals, (3) the explanations and answers of representatives of the services to these complaints, (4) the various suggestions made by organizations and individuals for modification or reform, and the arguments of the services as to the practicability of each, and (5) some of the provisions of foreign military establishments and their applica-

tion in pertinent situations. The Committee endeavored to follow the directive of Secretary Forrestal to frame a Code that would be uniform in terms and in operation and that would provide full protection of the rights of persons subject to the Code without undue interference with appropriate military discipline and the exercise of appropriate military functions. This meant complete repudiation of a system of military justice conceived of as only an instrumentality of command; on the other hand, it negatived a system designed to be administered as the criminal law is administered in a civilian criminal court. The Code contains all the criminal law and procedure governing the Army, Navy, Air Force and Coast Guard both in time of peace and in time of war.

No one, and least of all any member of the Forrestal Committee, will contend that the Code provides the ultimate solution of the problems inherent in the situation where the acknowledged military necessity of providing effective means of enforcing discipline meets head on the generally accepted opinion of the American people as to the rights of every person accused of crime. As a basis for reaching a fair judgment concerning the merits and demerits of the Code and the utility of continued study, it may be helpful to consider the proposals for reform in the Army system made by General Ansell in 1919 and to observe the extent to which his ideas have been made effective by legislation culminating in the Code.

1. The usual criminal code defines or describes the prohibited conduct and fixes the penalty for each offense within specified limits. The sentencing power is usually in the judge but sometimes is conferred upon the jury. In military codes the offenses often are more generally defined and each carries such penalty as the court-martial may in its discretion impose, except that in time of peace the President may prescribe maximum punishments for other than capital offenses. Ansell proposed that the offenses be more specifically defined and a definite maximum penalty be set for each offense. None of the subsequent legislation has adopted this proposal as to penalties. The Act of 1920 expanded the power of the President to prescribe maximum penalties by making it applicable in time of war as well as in time of peace. The Uniform Code provides generally that the punishment which a court-martial may direct for an offense shall not exceed the limit prescribed by the President for that offense. It does define offenses. In fact it rearranges the punitive articles and redrafts them so as to conform in language and substance with modern penal legislation. Thus in some respects the Code goes well beyond Ansell's objectives, but it does not meet his demand for specified and limited penalties.

2. Before 1920 the general court-martial was composed of not less than 5 or more than 13 officers; the special court of not less than 3 or

more than 5 officers and the summary court of one officer. Ansell would have fixed the general court at eight and the special at three. No subsequent legislation has adopted this proposal. The Uniform Code prescribes only the minimum number of members for general and special courts.

In this connection it is necessary to consider a custom of the service which was neither authorized nor prohibited by the Articles of War. It goes without saying that no judge or other official can during a trial change the composition of a civilian jury by excusing some of its members and replacing them with others, unless the parties expressly consent; nor can a defendant be required to proceed with less than the constitutional number. In the service the convening authority of a court martial is empowered to relieve a member of a general or special court during the trial so long as the membership is not reduced below the required minimum and to add new members up to the allowable maximum. Ansell's proposal did not affect this custom. Merely fixing the number of members would not have prevented change of membership, but it would have made it more difficult; and if Ansell's methods of selecting members of the court had been adopted, this custom of the service would have been almost, if not quite, useless as a device for command control of the court. The Uniform Code in Article 29 provides that no member of a general or special court shall be absent or excused after arrangement of the accused except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

It permits the adding of members and prescribes the procedure in general and special courts whose membership has been reduced below the minimum and to which new members have been added. This article recognizes the military necessity of transferring officers from court-martial duties to other functions in unusual situations. Assuming honest administration, it is a wise provision; but it must be conceded that it carries risk of abuse. If the Code were applicable only in peace time, this article could hardly be justified.

3. Though before 1920 no Article of War required an investigation of charges duly preferred against an accused, the *Court-Martial Manual* directed the officer exercising summary court-martial jurisdiction to investigate the charges carefully before forwarding them to superior authority and to give the accused an opportunity to make a statement and to offer evidence and any matter in extenuation. Ansell proposed that the investigation and report be made mandatory by statute and that no charge should be referred for trial unless an officer of the Judge Advocate General's Department certified in writing upon the charge (1) that a punishable offense was charged with legal sufficiency against the accused and (2) that it had been made apparent

to him that there existed prima facie proof of accused's guilt.

The Act of 1920 in Article 70 forbade reference to a general court for trial until after a thorough and impartial investigation, at which accused should be given an opportunity to cross-examine any available witnesses against him and to offer evidence, and the investigating officer was bound to examine available witnesses requested by the accused. The Elston Act added the requirement that upon request the accused be represented by counsel. The Uniform Code adopts the Elston Act provision. A violation of the Article is, of course, ground for reversal by superior authority, but it does not deprive the military court of jurisdiction so as to enable the accused to secure a writ of habeas corpus from a civilian court. Thus the Ansell proposal as to preliminary investigation has been accepted and strengthened.

The Elston Act and the Uniform Code impose upon the convening authority the duty of submitting the charges to his staff judge advocate before ordering a trial, and provides that he shall not refer a charge to a general court for trial "unless it has been found that the charge alleges an offense and is warranted by evidence indicated in the report of investigation." This is designed to accomplish the purpose of Ansell's article; but it is weaker. It is somewhat strengthened by the provision of the *Court-Martial Manual* that the opinion of the Judge Advocate will accompany the charges if they are referred for trial, but the decision lies not with a legal officer but with the convening authority.

4. Ansell's plan for the selection of the personnel of court and counsel and for the exercise of their respective functions called for startling changes:

a. It made an enlisted man competent to serve as a member of a general or special court-martial. If the accused was a private on trial before a general court, three of the eight members must be privates; if on trial before a special court, one of the three members must be a private. When the accused was a noncommissioned officer, the court must have a like proportion of noncommissioned officers as members.

Both the Elston Act and the Uniform Code provide that when an enlisted man is the accused before a general or special court he is entitled to have at least one-third of the membership of the court enlisted personnel chosen from a unit other than his own. This is only when he makes an appropriate written request. Since noncommissioned officers are enlisted personnel they may be selected for the trial of privates. And it seems to be the practice for the appointing authority always to select them. Reported experience shows this provision has not worked to the benefit of the soldier. Whether, and to what extent Ansell's proposal would have been better is debatable. Incidentally, it should be noted that prior to and during World War I the members of the court in closed session determined the guilt or innocence of the

accused by oral vote after discussion. The vote was taken in inverse order of the rank of the members. But this did not serve to protect junior officers from the overpowering influence of their superiors. Ansell's draft did not change this. The 1920 Act and all subsequent legislation required the vote to be by secret written ballot.

b. Ansell would have required concurrence of three-quarters of the members of a general court for conviction of any offense, and a unanimous court for imposition of the death penalty. It will be noted that where enlisted men were on trial, the enlisted personnel had power to prevent a conviction. The 1920 Act provided that for a conviction of an offense carrying a mandatory death penalty or for any sentence of death, a unanimous vote was requisite; for imprisonment for life or more than ten years, the concurrence of three-quarters of the members, and for other convictions and sentences, concurrence of two-thirds of the members. This provision is continued in the Elston Act and the Uniform Code.

c. Under Ansell's Article 12 the convening authority must appoint for each general and special court an officer called the Court Judge Advocate who must be either an officer of the Judge Advocate General's Department, if available, or, if such a one is unavailable, an officer recommended by the Judge Advocate General as specially qualified by reason of legal learning and experience. This court judge advocate would perform all the functions of a judge in a civilian criminal trial, including the duty to see to it that the rights of the accused were properly protected and for that purpose to call and examine witnesses. He would rule upon all motions and all questions properly presented, and in case of conviction would pronounce sentence. He was not a member of the court but must sit with it in all open sessions.

For each general or special court the appointing authority would choose a panel of fair and impartial members, from which the court judge advocate would select and organize the court.

No subsequent legislation has gone so far. The 1920 Act provided that the appointing authority of a general court should detail as a law member of the court an officer of the Judge Advocate General's Department if available, otherwise an officer selected as specially qualified for that position. He ruled upon all interlocutory questions, but his rulings were final only upon objections to the admissibility of evidence. On all other matters such as competency of witnesses, order of presenting evidence and conduct of counsel, his rulings were subject to be overruled by a majority of the members of the court in closed session. He was also required to instruct the court concerning the presumption of accused's innocence and the burden of the prosecution to prove guilt beyond reasonable doubt. The Elston Act prescribed the

qualifications of the law member. He must be a member of the Judge Advocate General's Department, or an officer who is a member of the bar of a court of the United States or of the highest court of a state. It allowed the appointing authority no discretion to appoint a nonlawyer as "specially qualified." It increased his powers and duties by making his rulings final except on a motion for a finding of not guilty or on a question of accused's sanity. The court alone ruled on challenges. The Uniform Code substitutes a law officer for the law member, and puts him in the position of a trial judge. He is not a member of the court, does not retire with the court during its deliberations and has no vote on conviction or sentence. He must instruct the court as to the elements of the offense charged, the presumption of accused's innocence and the burden of proof. Obviously we are still a long way from Ansell's plan. The court is still selected by the convening authority as is the law officer, but an unqualified officer cannot function because the appointing authority finds no one available who has the prescribed qualifications.

d. Ansell's plan imposed upon the appointing authority the duty to assign to accused military counsel of accused's choice, unless the appointing authority furnished the court a certificate to be placed in the record that the officer or soldier chosen by the accused could not be assigned without serious injury to the service for reasons set forth in the certificate. And if the accused convinced the court judge advocate that he needed civilian counsel and was without the necessary means to procure counsel, the court judge advocate must retain such counsel for him.

The 1920 Act required the appointing authority of a general or special court to appoint counsel for the accused. The Elston Act added that such counsel, as well as counsel for the prosecution, must, if available, be an officer of the Judge Advocate General's Department or a member of the bar of a federal court or of the highest court of a state; and in all cases where the prosecuting judge advocate has such qualifications, defense counsel must also have them. The Uniform Code prescribes the same qualifications for counsel of a general court but makes them mandatory. That weasel phrase, "if convenient," is eliminated. Thus a general court is presided over by a qualified lawyer and both prosecution and defense are represented by qualified lawyers. Of course, the accused can employ civilian counsel at his own expense, but there is no provision for furnishing civilian counsel at government expense.

For a special court no law officer is provided; and as to counsel, the provision of the Elston Act that the qualifications of defense counsel shall equal those of counsel for the prosecution is retained.

e. Ansell would have made provision for attacking the entire panel

of court members by a proceeding somewhat similar to a challenge to the array or panel in a civilian court, based on prejudice of the appointing authority or defects in the constitution or composition of the court which would hinder a fair trial; and would have given the accused two peremptory challenges to individual members of the court as well as retained his right to challenge any member for cause. He would also have made the trial judge advocate subject to be disqualified by affidavit of prejudice. The Act of 1920, the Elston Act and the Uniform Code give one peremptory challenge to each side. There is no challenge to the panel and the law officer is subject to challenge only for cause.

Insofar as the general court is concerned, the mandatory qualifications of the law officer and counsel will make for a more efficient trial than those of the Ansell articles; but the protections of the accused against unfair action of the appointing authority are not nearly so adequate. And many of the pre-existing alleged deficiencies in the administration of special courts have not been eliminated.

5. Even more radical were Ansell's proposals for proceedings after trial. When an accused is convicted in an American civilian court, he may in modern times move for a new trial before the trial court and he may appeal to a higher court, which ordinarily will review the case for errors of law. By making this appeal, he waives his constitutional right not to be twice tried for the same offense. He must bear the expense of preparation of the record for the appeal and must be responsible for the fees of his counsel. Provision is made for furnishing him trial and appellate counsel and for producing a record on appeal at government expense only in case he is indigent; and then the choice of counsel lies with the court. In the services, the findings and sentence of a general or special court-martial are not final until acted upon by superior military authority. The usual course is for the record to go to the authority convening the court for approval, disapproval or modification. In addition, certain sentences require confirmation by the President. The power of the convening authority to disapprove enabled him to send back to the court for reconsideration a finding of not guilty and a sentence which he considered inadequate. Of course, he could disapprove the whole proceeding and order the accused restored to duty. The Ansell Articles abolished this system.

a. They specifically forbade reconsideration of a finding of not guilty, or the imposition of a sentence more severe than that originally pronounced unless the greater sentence was mandatory by statute. There was no review by the appointing or convening authority but he was given power to mitigate, remit or suspend any sentence not extending to death or dismissal.

b. They set up a Court of Military Appeals consisting of three judges to be appointed by the President with the advice and consent of the Senate, each to hold office during good behavior and to have the pay and retirement pay of a circuit judge of the United States. The Court, for convenience of administration only, was to be located in the office of the Judge Advocate General Department. There was no express provision that its members be civilians, though that was probably contemplated. The court was to review every case of a general court in which the sentence involved death, dismissal or dishonorable discharge or confinement for more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the rights of the accused without regard to whether the errors were made the subject of objection or exception at the trial. The accused could prevent review by stating in open court when sentence was pronounced that he did not wish his case reviewed by the Court of Military Appeals.

The Court was to have power to disapprove a finding of guilty and approve only so much of it as involved a finding of guilty of a lesser included offense, and to disapprove the whole or any part of a sentence. It was to advise the appropriate convening or affirming authority of the proper action to take, including the ordering of a new trial, and to report to the Secretary of War for transmission to the President recommendations of clemency.

Review of cases by special or summary court by a judge advocate was provided.

The Act of 1920 rejected this proposal *in toto*. It continued the initial review by the convening authority, as the Elston Act did and as the Uniform Code does. The latter two permit him to take action for accused's benefit but not to his detriment. As an administrative device Ansell, while Acting Judge Advocate General, had set up in the office a Board of Review consisting of three officers. They reviewed all records in due course and wrote opinions and recommendations for signature of the Judge Advocate General, who might accept, reject or modify them before transmission to the proper military authority or the Secretary of War. The Act of 1920 provided that the Judge Advocate General should set up in his office a Board of Review consisting of three or more officers. (1) The Board was to review the records of all trials in which the sentences imposed required confirmation by the President and submit its opinion to the Judge Advocate General, who was to transmit it with his recommendations directly to the Secretary of War for action by the President. The Judge Advocate General might disagree with the Board, the whole communication was only advisory, the President might or might not follow the recommendation of the Board or the Judge Advocate

General. And in fact he would ordinarily have and act upon the advice of the Secretary of War, who had in all probability consulted the Chief of Staff or his representatives. (2) Where the sentence of a general court in a case not requiring confirmation by the President involved death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, the Board had to review the record and if it, with the approval of the Judge Advocate General, held it legally sufficient, the Judge Advocate General so advised the reviewing or confirming authority that had submitted the record, who might then order execution of the sentence. If the Board and the Judge Advocate General agreed that errors of law had been committed, injuriously affecting the substantial rights of the accused, the Judge Advocate General was to transmit the record through military channels to the convening authority for appropriate action. If the Judge Advocate General did not concur with the Board, he was to send all papers in the case, including the opinion of the Board of Review and his own dissent, to the Secretary of War for action of the President. Thus the Judge Advocate General retained the power to make the decision or opinion of the Board merely advisory. And in some notable cases during World War II his opinion prevailed over that of the Board.

All other records of trial by general court were to be examined in the Judge Advocate General's office. If the examining officer found the record legally insufficient, the record went to the Board and if it agreed, the procedure thereafter was that for cases requiring confirmation by the President. Provision was made for more than one Board of Review when needed and for such boards in duly authorized branch offices.

The Elston Act made more elaborate provisions for review. It set up in the Judge Advocate General office a Judicial Council composed of three General Judge Advocate General officers, and a Board of Review composed the three Judge Advocate General officers. It provided for confirmation of some sentences by the President, of some by the Secretary of the Army and of some by the Judicial Council with the concurrence of the Judge Advocate General. As to each of these, the power of the Board and of the Judicial Council and the procedure for review varied. The Judge Advocate General's nonconcurrence with the Board or Judicial Council required reference to higher authority. It would not be profitable to go into detail. It is sufficient to state the system within the office was elaborate and the control by military officers was almost complete.

Prior legislation had confined the power of review to consideration of errors of law. The Elston Act authorized both the Board of Review and the Judicial Council to consider both law and fact, to

weigh evidence, judge the credibility of witnesses and determine controverted questions of fact.

These provisions for review were designed to lessen the dangers of command control. To the same end an amendment to the National Defense Act was enacted setting up a separate Judge Advocate General Corps with a separate promotion list fixing the percentage of officers of the several ranks below that of Brigadier General and providing for two Major Generals and three Brigadier Generals. Furthermore, the Elston Act made it proper for judge advocates to communicate directly to the Judge Advocate General rather than through ordinary military channels.

The Uniform Code, which applies to all the services, establishes a Board of Review in the office of the Judge Advocate General of each service. It may be composed of officers or civilians, but each member must be a member of the bar of a federal court or of the highest court of a state. Officers of the Judge Advocate General Department who are not admitted to the bar are therefore not eligible.

The Board reviews all cases where the sentence approved by the convening authority affects a general or flag officer or extends to death, dismissal of an officer or cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for a year or more. It affirms only such finding of guilty or such sentence or part or amount of sentence as it finds correct in law and fact and determines on the whole record should be approved. It weighs evidence, determines credibility of witnesses and determines controverted questions of fact.

If the Board sets aside the findings and sentence, it may order a rehearing, or where it finds the evidence insufficient, it may order the charges dismissed. Its decision in so doing is final and the Judge Advocate General must so instruct the convening authority unless the Judge Advocate General disagrees, in which case he may submit the case to the Court of Military Appeals.

The Code sets up a Court of Military Appeals, consisting of three civilian judges, each of whom receives the salary of a judge of a United States Court of Appeals, $17,500, but has none of the other emoluments of such a judge. The term of office is 15 years, though in the first court one member was appointed for five years and another for 10 years.

The court is required to review (1) all cases in which the sentence as affirmed by the Board of Review affects a general or flag officer or extends to death, (2) all cases reviewed by the Board which the Judge Advocate General orders forwarded to the court for review. It may receive petitions from an accused to review a case reviewed by the Board and will grant review if good cause is shown. The court acts only with respect to questions of law.

Article 70 of the Uniform Code provides:

> a. The Judge Advocate General shall appoint in his office one or more officers as appellate Government counsel, and one or more officers as appellate defense counsel who shall be qualified under the provisions of article 27 (b) (1), which prescribes the qualifications of counsel for a general court.
>
> b. It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Court of Military Appeals when directed to do so by the Judge Advocate General.
>
> c. It shall be the duty of appellate defense counsel to represent the accused before the Board of Review or the Court of Military Appeals—
>
> (1) when he is requested to do so by the accused; or
>
> (2) when the United States is represented by counsel; or
>
> (3) when the Judge Advocate General has transmitted a case to the Court of Military Appeals.

In short under the Uniform Code wherever an accused is charged with an offense that carries a serious penalty, he has the benefit of a thorough preliminary investigation at which he has greater protection than is afforded one similarly charged in a civilian court; if brought to trial he is furnished competent military counsel without expense to himself and can employ civilian counsel if he so desires; the court before which he is tried is presided over by a competent lawyer who acts as a judge enforcing such rules of evidence as are usually applied in a United States district court; if convicted he is entitled to a review of his case on the law and the facts by a tribunal composed of competent lawyers before which he may on request be represented by competent military counsel without expense to him or by civilian counsel employed by him; and finally, he may on the same terms seek review for errors of law before a court composed of civilians, which will entertain his appeal if he shows good reason therefor; and if he has been sentenced to death, must entertain it.

What then is lacking? In civilian life the judge is appointed or elected in a manner which is free from any reasonable probability of pressure to reach a particular result in any pending case, and the jury is selected in a manner designed to eliminate prejudice or subjection to improper influence. Under the Code the convening authority appoints the judge and the court and the defense counsel for the trial of specified charges which he deems supported by sufficient evidence. The primary purpose of the proceeding for the convening authority is the enforcement of military discipline. The members of the court as well as the judge are men to whom military discipline usually seems of high importance, and who are in their ordinary professional activities subject to the authority and control directly or indirectly of the convening authority. The members of the Board

of Review are military men and subject to the ultimate control of military authority. Civilian authority comes into play only as to matters of law.

Everyone realizes the importance of discipline and the necessity of command control in military matters. Only a few have fear of the exercise of improper influence of the convening authority over the Board of Review; but many fear that being military men and part of the military machine, its members may overemphasize the importance of discipline and discount the importance of guaranteeing the accused a fair and impartial trial.

The Elston Act with its amendments to the National Defense Act assumes that making the judge advocates general into a corps will make for more efficient personnel and insure independence of action, although The Judge Advocate General is of course under the Chief of Staff. Neither the Navy nor the Air Force has a separate legal corps. Experience under the Code may demonstrate that the Army's administration of justice excels that of the other services, but that remains to be seen.

Ansell's plan of having a general panel selected by the convening authority and the trial judge, who would be appointed by the Judge Advocate General, choose the court from the panel, if practicable, might help; but so long as the court consists of officers subject to control by the convening authority or his associates, the possibility of command interference will persist. If the superior officers in the services are determined to exercise improper control over the trial, no safeguard will suffice so long as the trial court is composed of military men. We may have to come to a system where the trial judge, and the members of the Board of Review, as well as the Court of Appeals, are civilians.

If experience under the Code shows that the influence of command control has not been eliminated, it may well be that a new system will have to be established in which the military will have control only over the processes of prosecution, and the defense, trial and review be under the exclusive control of civilians. The services have the opportunity of demonstrating to Congress that the concessions made in the Code to the demands for effective discipline do not impair the essentials of a fair, impartial trial and effective appellate review.

That Congress intends to require this demonstration is found in the provision of the Code which requires 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 Secretary of Defense, the Secretaries of the Departments and to the Armed Services Committees of the Congress the number and status of pending cases and any recommendations relating to uniformity of

sentence policies, amendments to the Code and other appropriate matters. If this provision is conscientiously observed, Congress and the public can determine whether the area of civil control over the administration of military justice should be expanded. And it should be one of the chief objectives of the Court to see that the provision is observed in spirit as well as letter.[12]

12. The substance of this article was given in an address to the 1951 annual meeting of Phi Beta Kappa at the University of Kentucky.