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UCMJ--Does it Work? Evaluation at the Field Level, 18 Months Experience

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UCMJ — DOES IT WORK?
EVALUATION AT THE FIELD LEVEL, 18 MONTHS' EXPERIENCE*
I. THE JUSTICE ELEMENT
II. THE MILITARY ELEMENT

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INTRODUCTION — NATIONAL SURVIVAL IN THE THERMO-NUCLEAR ERA

Is the Uniform Code of Military Justice[1] working effectively now, in times of quasi-peace?

Will it work effectively under conditions of a World War III?

Combat area experience of Naval units applying UCMJ in the Korean theatre is now available for appraisal.[2] To foreshadow effects of the new code upon administration of Naval Justice under conditions of another world war, the Commander-in-Chief, U.S. Pacific Fleet, directed an on-the-spot survey of the impact of the Code upon all types of naval vessels in the Japan-Korea area. Included were nearly 100 ships, consisting of 9 large combat types, 38 destroyers or destroyer-escorts, 2 submarines, 22 transport and amphibious type and 12 mine-sweepers.

The reactions to UCMJ produced through this CINCPACFLT survey are predominantly and primarily those of the Commanding Officers of these combat and support ships — the men upon whom will fall the responsibility of fighting to win in a possible all-out war.

Also available now is the first year and a half of experience in actual application of UCMJ at large Naval installations in the continental United States and on ships operating in areas other than those of combat. A close-up view of the new type of "service justice," taken from the field level of trials and initial review, can be derived from actual cases handled in one of the largest of the Naval Districts.[3] In-

* The views expressed herein are those of the author and do not represent the opinion or policy of the Department of the Navy.

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1. 64 STAT. 108 (1950), 50 U.S.C.A. §§ 551 *et seq.* (1951). Also referred to throughout this article as UCMJ.

2. "Report of Survey of the impact of the law (UCMJ) and its implementing regulations upon ships operating under war conditions," published as Enclosure (1) to letter dated 1 October 1952, ser. 6733, from Commander in Chief, U.S. Pacific Fleet, to Chief of Naval Operations, Judge Advocate General and Chief of Naval Personnel. Referred to throughout this article as the CINCPACFLT Survey. The survey was conducted and the study thereof prepared by Commander Jack Linwood Kenner, U. S. Navy.

3. Twelfth Naval District. Includes such major activities as the U. S. Naval Receiving Station, Treasure Island; Naval Station, Treasure Island; San Francisco Naval Shipyard; Mare Island Naval Shipyard; Naval Air Station, Alameda; Naval Air Station, Moffett Field; Schools Command, Treasure Island.

cluded in these cases are scores from operating United States Ships, U.S. Naval Ships (Military Sea Transportation Service units), shore establishments, receiving stations and the Pacific Reserve Fleet.

The reactions to UCMJ produced through this appraisal are those of the Navy lawyer, as distinguished from Navy command personnel. Necessarily, the personal element cannot be eliminated completely in such a study. For such a purpose, the best that a Navy lawyer can do is, as he does in his primary mission, to "call 'em the way he sees 'em." In any event, this experience has included responsibility for the legal review under UCMJ of nearly five thousand cases. Included are 237 general courts-martial, 1,447 special courts-martial, 2,525 summary courts-martial and 331 recommendations for general courts-martial.[4]

Both of the types of experience thus available for formulating an answer to the question of "Does UCMJ work?" are thus tied up with the Navy. But if UCMJ does work in the Navy, it must in all reasonable probability work at least equally effectively for the other two major services. This is because the initial impact on the Navy was tremendously greater than on the Army or Air Force, the transition was more abrupt[5] and the Navy has more problems arising out of deployment and wide dispersion of operating units.

Before examining this material concerning the day-to-day operation of UCMJ, however, formulation of an approach is necessary to translate statistics into meaning. An evaluation of the national as well as legal-professional importance of the several major questions necessarily involved also will assist in getting the most value out of determining whether the new system of service justice is merely a fine theory, or if it actually works.

To find a firm answer to the question of whether any system is working in actual practice, it must first be determined what the system is, and what it is supposed to do.

Will the name answer the question?

Some names do not. The Holy Roman Empire of a bygone day, the

4. District Legal Office Monthly Reports to Commandant, Twelfth Naval District, months of June, 1951 through November, 1952. The author of this article served as District Legal Officer, Twelfth Naval District, from January, 1950 through November, 1952. Additional duty, from the experience of which some of this material was obtained, included: Director, Legal Division, Western Sea Frontier; Staff Legal Officer to the Commander, Pacific Reserve Fleet; Legal Officer, Naval Base, San Francisco.

5. The Articles of War, which had governed the Army and Air Force, 41 STAT. 787 *et seq.* (1920), 10 U.S.C.A. §§ 1471 *et seq.* (Supp. 1951), were amended as late as 1948 to a system much closer to UCMJ than the Articles for the Government of the Navy, which had not been substantially revised since 1928. NAVOP #12, of 7 June 1950, addressed from the Chief of Naval Operations to the Naval Service, was the first general notice of enactment of the new code. After briefly reciting the new types of courts-martial, it warned that investigation and trial procedures were "radically revised," and that "Review Procedures were radically revised."

historians tell us, was neither Holy, nor Roman, nor an Empire. In the present day, our own nation has finally penetrated — perhaps not too late — the semantic camouflage of "Peoples' Democracies" and "Peace Drives."

Thus names, particularly names of systems, can be misleading. Some are deliberately so, each word intended to deceive, with nothing in the system living up to the propaganda promise of any word in the name. Unlike such names, however, the "Uniform Code of Military Justice" is all that each word of the name implies. And all of those things are, in the practically unanimous judgment of the American people, desirable. Indeed, it would be naive to fail to appreciate the high potency of each of the words of the name (with the possible exception of the word "military") to evoke favorable emotional as well as logical reactions from Americans.

Uniform, the Code certainly is, by the key definitions of Article 1 thereof, which group the Army, the Navy, the Air Force and the Coast Guard under the composite term "armed force," and the applicability provisions of Article 2. Also, uniformity of territorial application is provided by short, simple Article 5, which declares that "This Code shall be applicable in all places."

Certainly there is no supportable reason why any one of our armed forces should have a brand of justice inferior to that of the others. Nor should there be any substantial differences, unless clearly required by corresponding differences in function, organization or deployment of one of the services. Justice is not, according to American standards at least, justice at all unless it is equal justice.

A code, UCMJ certainly is, from its organization, content and general applicability to the several armed services. A code was necessary to secure the end of uniformity and for the purpose of simplification. It was purposed to impose a single system where several diverse systems had theretofore obtained. The scope of the repeal provision of Section 14[6] are most impressive evidence of the effect of codification by force of a single statute. And codes are popular with Americans because of their traditional quality of bringing order out of confusion.

Justice also is an integral part of UCMJ, this element being the most sought for in the legislative history and background of the new Code.[7] The sincere intent to promote the ends of justice is outstanding from the four corners of the entire system. Most appropriately so, since the mission of our military is to defend the American way of life, which, as all the people know instinctively and the lawyers from experience

6. Twenty-two statutes are listed as repealed in whole or in part.

7. See generally, REPORT OF THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE (1949); this is widely referred to as the Morgan Report; and see H.R. REP. No. 491, 81st Cong., 1st Sess. (1949); SEN. REP. No. 486, 81st Cong., 1st Sess. (1949).

as well, must rest upon that precept, emblazoned on the edifice of the Supreme Court of the United States, "Equal Justice Under Law."

Nevertheless, the name "Uniform Code of Military Justice" is misleading. It could be fatally so, from the standpoint of survival of this nation, in this newly-opened era in which thermo-nuclear energy can now be fashioned into weapons.[8]

For although the "Uniform Code of Military Justice" is all that its name implies, it is also tremendously more than is included by fair implication in that name. A cogent introduction to this proposition is put by Judge Brosman of the Court of Military Appeals in these words:

> "Naturally, the committee's several drafts of the uniform Code were aimed at, and the Code reflects, a balancing of the two essential ingredients of military justice: the justice element and the military element. . . . . Now by the term 'the justice element' as a component in the code, I mean, of course, to include those safeguards and other legal values which are a part of enlightened criminal law administration in the civilian community. By the second I mean, principally to comprehend acute considerations of discipline in the abnormal social situation, limitations growing out of the realities and the necessities of military and naval operations and the like. These properly recognized differences, as I see it, differences between the problem we find in civil law administration and, on the other hand, as we find it in military law administration, can well cut both ways. . . .[9]"

But even this eminent recognition of the problem couples the "military" element only with problems of *administration.* The name itself is more misleading in that the only mention of "military" therein modifies the "justice" element, which, as Judge Brosman points out, is "criminal law administration" in this connection. So it is that the name "Uniform Code of Military Justice" leaves untold about as much as if the Constitution of the United States had been labelled instead, "Basis for a Federal Judicial System."

The Constitution set up the entire system of *government* for the nation and the states, and did not just provide that there could be a federal judicial system. UCMJ is just as basic and vital to the armed forces of the United States. It is not a mere system of procedure for courts-martial, as its name implies. Furthermore, it is not only *a* system of government for the armed forces. It is the *only* system of government, and sanction for government, of the armed forces. It repealed all prior government existing in the armed forces.[10] Thus,

8. Statement issued by Atomic Energy Commission on November 16, 1952 concerning experiments conducted at Eniwetok Atoll and published in national press on November 16 and 17, 1952.

9. Address by the Honorable Paul Brosman, Judge, United States Court of Military Appeals, delivered to the U. S. Naval School (Naval Justice), Newport, Rhode Island, on 10 October 1952.

10. By the repeal provisions of § 14, *supra* note 6.

for prime example, it repealed the "Articles for the Government of the Navy," a system correctly named.[11] It repealed also the "Articles of War," which were the systems of government for the Army and Air Force, in time of peace as well as in war.[12]

What does this mean, in terms of importance of UCMJ to the armed forces and hence to national survival? Simply that there is no sanction for the essential regulations for the government of those services except as provided in UCMJ. Navy Regulations, Army Regulations, Air Force Regulations; regulations at the Army, Fleet, area, and district levels; ship's regulations, company regulations — all these are sanctioned only as provided in the new Code.[13] Men and officers in the services need obey orders of routine nature and commands in combat, only so far as they are sanctioned by UCMJ.[14] The sole mandatory force now backing up discipline in the armed forces of the United States is that provided by the Uniform Code of Military Justice.[15]

The history of all civilization shows it becoming vulnerable to being plowed under by barbarians whenever the armed forces upholding any particular civilization lost the measure of discipline necessary to preserve national security. Even without the weapons developed by a high state of civilization, with no psychological warfare, with no concept of advanced strategy and tactics, the barbarians were able to overrun the Roman Empire and destroy Pax Romana. The Roman Army had become soft. In the present era, the forces seeking to overthrow the civilization of freedom are armed, presumably, with atomic weapons, and have the most effective propaganda campaigns and psychological warfare ever developed. Their strategy has been second to none, as yet, and their tactics have proved most effective.

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11. REV. STAT. § 1624 (1862), derived from Act July 17, 1862, c. 204, § 1, 12 STAT. 600 (1862).

12. 41 STAT. 787 *et seq.* (1920), as amended, 10 U.S.C.A. §§ 1471 *et seq.* (Supp. 1951).

13. Navy Regulations, 1948, which are the general rules governing the entire naval establishment, although adopted prior to the effective date of UCMJ, pursuant to REV. STAT. § 1547 (1948), were not repealed by § 14 of the Act of May 5, 1950, (*supra* note 1), and are, therefore, except where inconsistent with UCMJ, sanctioned thereby. See letter of the late Honorable Francis P. Matthews, Secretary of the Navy, dated 24 October 1950, promulgating UCMJ to the Naval Service, and also enacting clause of the Act of May 5, 1950 which refers only to the "Articles for the Government of the Navy." Also see UCMJ art. 92, 50 U.S.C.A. § 686 (1951); MCM ¶ 171 (1951).

14. Commands and orders are now sanctioned by UCMJ arts. 90, 92, 50 U.S.C.A. §§ 684, 686 (1951), so far as orders of superior officers are concerned; so far as orders by petty officers, UCMJ art. 91 (2), 50 U.S.C.A. § 685(2) (1951).

15. Discipline can be backed up only by imposing punishment upon those individuals who violate the rules and regulations which establish and maintain discipline in the armed forces. All the prior systems of service justice were repealed by UCMJ. *Supra* note 10. UCMJ art. 97, 50 U.S.C.A. § 691 (1951), prohibits any confinement in the armed forces "except as provided by law," and the only authority of law of any general effect in the armed forces is to be found in UCMJ itself.

If they find holes deep enough, get there soon enough and stay there long enough, individuals may survive Communist attack against us with thermo-nuclear weapons. The nation cannot survive, as such, however, and the American way of life cannot be preserved unless the armed forces of the United States are maintained as a powerful striking force, sufficiently disciplined to be truly effective. We must be able to strike back, and destroy the enemy's war potential so that Communists cannot invade the United States. If our armed forces are strong enough, we may lose a few, or perhaps many cities; but the United States may be preserved.

Thus it develops that the preservation of all systems of justice, as Americans know justice, civilian as well as military, will depend, at least indirectly, upon the Uniform Code of Military Justice. Whether UCMJ affords a fine system of administration of military-criminal law, with adequate safeguards for the accused is an important question to all Americans. Whether it provides adequate and effective systems of government and discipline to promote the mission of the armed services is a vital question, a question of life or death for the American nation.

What is the mission of the armed forces of the United States? In a confused world, there is at least one simple answer. In the words of the Commander-in-Chief, Atlantic Fleet, spoken in connection with UCMJ, that mission is:

"To win wars, not just fight them."[16]

The second prize in wars now is a mixture of liquidation and slavery. It is well to remember those prisoners of war, German and Japanese, held by the Communists. Also the fate of non-Communist Russians and Chinese. And Katyn Forest.

In evaluating the operating success of a system of civilian justice, the problem has duality only. The test, most generally stated, is:

(1) Does it work to protect society against the depradations of lawless individuals?

(2) Does it work to protect the individual against deprivation of his life, liberty, dignity or property by arbitrary action of organized society?

In evaluating the operating success of the Uniform Code of Military Justice, the question becomes three-pronged, because there must be added this element:

(3) Does it provide a system of government and discipline, with adequate and effectively applied sanctions, to ensure the accomplishment of the mission of the armed forces of the United States?

16. "The primary objective of the military services is to win wars, not just fight them." Atlantic Fleet Letter 16L-50 from Commander in Chief, U. S. Atlantic Fleet, to U. S. Atlantic Fleet, 6 November 1950.

Somehow, a third balance must be added to the traditional figure holding the twin scales of impartial justice, so that in balancing the conflicting interests involved there may be weighed also the right of a nation to self-preservation.

So thus it must be that an article attempting to evaluate the operating effectiveness of the Uniform Code of Military Justice requires division into two parts, one considering the "justice element" as defined by Judge Brosman,[17] the second part dealing with the "military element," in a broader sense, as defined in this introduction to the problem. Inevitably, the two elements cannot be completely isolated; for the "military element" has a strong interest also in the quality of the "justice element," even viewing the "justice element" as concerned primarily with safeguards for the accused. Because morale is just as essential to an effective armed force as is discipline, and the morale of the men depends not alone upon the calibre of the individual leadership offered by the officers in command, but also largely upon the feeling of the men and officers that the system of justice and discipline is essentially fair.

Also, it's difficult to imbue men with the spirit to fight to preserve the American way of life, when the basis of that way of life is justice, if the men who are expected to fight are denied any of the fundamentals of that justice.

Despite a close interrelation of subject matter, however, the answers to the questions propounded in the two parts could be entirely divergent. In Part I, the question will be, "Does the 'justice element' of UCMJ work in actual practice?" If the answer to that is somewhat negative in character, that would mean that some individuals in the armed services are not getting full justice in the American tradition. The answer to this question, however, could be primarily affirmative, with still a negative answer to the question of Part II; for it may be that in the critical operation of grafting a civilian type of criminal justice system upon the armed services, Congress implanted also an infection which may attack discipline, the red blood of any military organization, and whiten it down. Or, to press the medical metaphor in other terms, did the knife cut too far and emasculate the patient? Virility in any armed force depends upon the organs of discipline. Without discipline, armed forces lose their force and are reduced to military impotency.

If the answer to the question of whether the "military element" of UCMJ will work successfully under conditions of a World War III is negative, not merely a few individuals will suffer. This nation may not survive; the sacrifices of all members of the armed forces will have been in vain; and the tremendous financial and economic burdens

17. *Supra* note 9.

gladly undertaken by the United States for national security will be reduced to pitiful futility.

Lest it be considered that imaginary horribles have been conjured up to introduce the problems, let it be remembered that only a year ago, after "six months' practical experience" with the operation of UCMJ, the Commander-in-Chief, Pacific Fleet, declared that although the

> "Code was workable and . . . the Code per se is basically sound. . . .
> "It is the opinion of CINCPACFLT that the present complex regulations, under conditions of general war, would precipitate a paralysis of the Navy Judicial system."[18]

The United States developed military, naval and air forces sufficiently effective to win two world wars. This was done under the old systems of military justice and discipline. Can the nation win a third world war under the new system?

I. The Justice Element

Definition. The "Justice Element" of the Uniform Code of Military Justice includes, according to Judge Brosman's definition, "those safeguards and other legal values which are a part of enlightened criminal law administration in the civilian community." In considering the success this element has attained in actual operation during the first year and a half of UCMJ, the question is basically whether the accused has had a fair trial, received a just sentence, whether the review was adequate and fair and whether the course of justice was not unduly delayed. Outside the scope of this article, except in a most general way, are the more technical questions of what constitutes "military due process" as that theory has been developed in the decisions of the Court of Military Appeals.[19]

Since the entire Code is replete with "safeguards," only those major provisions which, in the experience of a year and a half of actual day-to-day operation of the new system, have proved most outstanding can be considered. A logical order of presentation may, of course, divide the safeguards into (1) those which operate prior to trial, (2) those which operate during the trial and (3) post-trial safeguards.[20] Not all of this third stage is within the scope of this article, however. Since the evaluation is made at the field level, only the first stage of review

18. Letter from Commander in Chief, U. S. Pacific Fleet, to the Judge Advocate General, ser. 7462, 21 December 1951.
19. See Wurfel, *Military Due Process*, 6 Vand. L. Rev. 251 (1953).
20. Many of these safeguards operate through the entire course of military justice; for the purpose of this classification, however, they are considered under the heading which indicates the period at which they normally first come into operation to protect the accused.

in the general court martial cases is included, and through the second stage of review in summary and special court martial cases. The higher levels of review, by Boards of Review and the Court of Military Appeals, are considered elsewhere in this Symposium.[21]

A. *"Safeguards" Operating Prior to Trial*

1. *Restraint of Persons*

Article 97 is short and simple, but sweeping:

> "Any person subject to this code who, except as provided by law, apprehends, arrests, or confines any person, shall be punished as a court martial may direct."[22]

The practical effect of this provision is to limit any confinement imposed within the armed forces to confinement specifically authorized by the Code. It is considered that the term "law," as used in Article 97, means primary law, such as statutes, and cannot fairly be construed to include regulations, even the type of regulation otherwise "having the force and effect of law." Certain it is that orders and commands, regardless of the high level of the echelon from which they originate, can no longer be relied upon as authority for confinement or any sort of restraint. Without suggesting that anyone in the services has ever been inclined toward indiscriminate confinement of any person, it did come as a shock to some officers that they could not put a person into confinement or restriction on the sole basis of orders from higher authority. In any event, it is certain that this Article precludes confinement or restriction on the sole basis of any "safe-keeping" theory.[23]

Searching the Code for specific authority, the provisions of Articles 9 through 13 will be found to be packed with safeguards. By far the most potent, however, from the standpoint of safeguarding accused persons, is the second sentence of Article 10:

> "When any person subject to this code is placed in arrest or confinement prior to trial, *immediate* steps shall be taken to inform him of the specific

21. See Currier and Kent, *The Boards of Review of the Armed Services*, 6 VAND. L. REV. 241 (1953), and Walker and Niebank, *The Court of Military Appeals — Its History, Organization and Operation*, 6 VAND. L. REV. 228 (1953).

22. 50 U.S.C.A. § 691 (1951).

23. "Safekeeping," as sometimes practiced before UCMJ, was frequently for the benefit of the persons so held. For example, in many large civilian communities, to which substantial numbers of naval personnel go on leave or liberty, local arrangements had been made between the Navy's Shore Patrol and local courts and police, which took the place of the civilian bail bond system. In consideration of the undertaking by the Shore Patrol to produce a civilian-authority-arrested sailor for his trial in civil court, the man would be released to naval authority, thus saving him from the unhappy alternatives of remaining in a civil jail (and hence committing a Navy absence offense) or going to the heavy expense of securing a bail bond — which few servicemen can afford.

> wrong of which he is accused *and to try him or to dismiss the charges and release him.*"[24]

Double strength is lent to this provision by Article 98:

> "Any person subject to this code who—
>
> (1) is responsible for *unnecessary delay* in the disposition of any case of a person accused of an offense under this code; or
>
> (2) knowingly and intentionally *fails* to enforce or *comply* with any provision of this code regulating the proceedings before, during, or after trial of an accused; shall be punished as a court martial may direct."[25]

These provisions, taken together, tremendously strengthen the hand of the officer in over-all command of a number of activities, in making sure that subordinate commands busy with many military missions do not get behind in the administration of justice in general. In specific cases, where undue delay appears likely to occur, the senior in command may direct attention to the case, with an admonition of this sort:

> "I realize that assembling the evidence of desertion in this particular case has required an extraordinary period of time. If it can't be produced promptly, however, reduce the charge to unauthorized absence. If the evidence to establish the absence is not available, then the law requires that you 'dismiss the charges and release him.' "

Similarly, mature seniors with over-all responsibility for administration of justice and a paternal regard for the men of the Navy are able, pleasantly but firmly, to remind junior officers that "unnecessary delay" in the disposition of court-martial cases must be recognized as an offense triable by court-martial equally with such more easily identified offenses as unauthorized absence. All of these provisions have proved in actual day-to-day operations to help tremendously in expediting the course of justice. And justice long-delayed is not justice at all—particularly in the military services. Thus, these provisions constitute fine examples of how UCMJ has promoted the "justice element" in military justice, without imposing any undue burdens on the "military element."

2. *Prohibition of Compulsory Self-Incrimination.*

Although entirely unsusceptible of statistical proof, there is no question that as a practical matter at least one of the four subsections of Article 31[26] is outstanding among the most effective safeguards provided by UCMJ. Subsection (a) deals compendiously with compulsory

24. 50 U.S.C.A. § 564 (1951) (emphasis supplied).
25. 50 U.S.C.A. § 692 (1951) (emphasis supplied).
26. 50 U.S.C.A. § 602 (1951).

self-incrimination, which it *absolutely* prohibits; subsection (c) prohibits compulsory statements which may tend to degrade, *on condition* that the statement or evidence is not material; subsection (d) outlaws as evidence any statement obtained in violation of any provision of Article 31, or obtained "through the use of coercion, unlawful influence, or unlawful inducement."

Those three subsections operate principally during the trial, but are included as pretrial safeguards, because they first come into operation effectively to protect an accused, long before even a formal pretrial investigation is commenced. Although important, these provisions did not substantially change, at least in the Navy, the results reached either through statute or case law prior to UCMJ.[27]

Most vital of all such protection, however, is that contained in subsection (b) of Article 31:

> "No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in trial by court-martial."

The greatest impact of this protection occurs, of course, at the initial stages of the investigation. Experienced defense counsel, both military and civilian, feel that this highly specific, absolutely mandatory, provision for warning is one of the finest things accomplished by the Code. There is no question that the required warnings were omitted in a not inconsequental number of cases during the transitional stage and early months of the Code. No known prosecutions for violations of Articles 98(2) resulted to those who failed to give the warnings, because of the requirement of proving that the violation was accomplished "knowingly and intentionally."

The Code has been long enough in effect now, however, that the sanction for failure to warn appears to be working with no known exceptions. Ignorance of the Code requirement can no longer be persuasively advanced as a defense. Earlier failures of compliance were, of course, cured by throwing out such statements or confessions during the trials or on review (mostly at the trial stage) by operation of subsection (d),[28] even though the statements would otherwise have been admissable. Although the subsection (b) mandate is directed only at "per-

27. Under the basic statutory law governing Naval Justice, the Articles for the Government of the Navy, NAVAL COURTS AND BOARDS (1937), implementing the law, and Court-Martial Orders, interpreting the law and regulations, involuntary confessions were not admissible. Article 42(c), AGN; N.C. & B. §§ 174-78 (1937); CMO No. 10-1934, pp. 10, 11; 12-1931, pp. 13-15; 3-1916, p. 6. Statements tending to degrade, unless relevant, were not admissible. N.C. & B. § 261 (c) (1937).

28. Cited in text, *supra* this page.

sons subject to this code," it is generally construed in the Navy to include the civilian investigators who are employed in the security divisions of many large Navy shore installations. This is clearly in accord with the spirit of Article 31.

It is difficult for laymen, or nonlawyer military officers, to appreciate the importance of Article 31, if the confession in question appears to them to have been voluntary and is convincing of guilt. A short explanation of how such protection stands as a shield for all Americans against Communist-type trials based on "confessions" of the Midzenty and other similar types seldom fails to convince, however. Spirit as well as letter compliance with UCMJ is always more cheerfully secured when the motivation of the Code is understood. Here again actual experience has proved that Congress has struck a fair and workable balance between the "justice element" and the "military element."

3. *Pretrial Investigation.*

New to the Navy in the formality and set procedure established thereby, Article 32[29] establishes rigid and high standards of the type of investigation which must be conducted in any of the armed forces before an accused may be brought to trial before a general court-martial. Of obvious merit so far as protecting an accused, it appeared in the transition period between the old procedure followed under the Articles for the Government of the Navy and the shaking down of UCMJ that this Article would impose momentous administrative burdens upon the Navy. This does not mean that the former type of investigation was not essentially fair, but it was certainly less formal.

To meet the requirements of subsection (b) of Article 32, what amounts to a pretrial "trial" must be conducted. Of course, the quantum of evidence differs from the court-martial trial, since what is sought is "probable cause" instead of proof of guilt; and the quality of the evidence differs in that the formal rules of evidence do not apply. Nevertheless, at least two of the outstanding elements of the "military due process" elements of an actual trial do apply, in full force. The accused must be given "full opportunity:"

(1) "To cross-examine witnesses against him if they are available; and

(2) "To present anything he may desire in his own behalf, either in defense or in mitigation."

A third protection, the right of counsel, is conferred subject only to his request therefor, and that right includes "civilian counsel if provided by him."

29. 50 U.S.C.A. § 603 (1951).

As it has worked out in actual practice, the pretrial "trial," shortened in service nomenclature to the "pretrial," has proved to be a tremendous boon to the accused. Not infrequently the result of a "pretrial" will be dismissal of the charges and release of the accused. This occurs most frequently in the relatively serious nonmilitary type of offense. But the most frequent result is the cutting down of desertion charges to unauthorized absence. This is a great gain for both the "justice element" and the "military element." For the accused, it opens many more probable chances of rehabilitation, as well as lesser punishment and infinitely less serious after-branding. For the Navy, it perhaps will save a sailor or valuable rated man, and it will most certainly speed the trial and reduce expense.

Unfortunately, this benefit to both the accused and the Navy is too frequently missed because the accused fails to make any statement in explanation or motivation of his absence, even though he may have one of reasonably persuasive character. Naturally, no statistics can be secured as to the reason for such high-cost silence, but it may perhaps grow out of some mistaken idea of trial tactics, with the thought of surprising the prosecution at the court-martial trial. This, of course, is doing things the hard way. There need be no trial on the serious charge if there is a reasonable explanation which would cut down the character of the offense. The more astute defense counsel, both civilian and military, take full advantage of this opportunity in the "pretrial."

One major "bug" in UCMJ pretrial procedure has been uncovered by actual experience. The cases in which a "pretrial" can best serve the interests of the "justice element" and the accused are those in which the charges are serious and of a scandalous nature. One outstanding type of case of this nature is that of the officer charged with homosexual acts or sodomy of some sort. If he is innocent, or perhaps even if he cannot be proved guilty, it is highly undesirable, both from his standpoint and that of the service, not to try him by general court-martial. In a tremendously high percentage of such cases, probably upwards of 80 per cent (based on a more or less well-informed guess which cannot be supported by footnote statistics), the prosecution's case against the accused cannot be reasonably evaluated without having the actual witnesses on the stand and subjecting them to examination and cross-examination. Typically, such offenses are allegedly committed on some ship deployed somewhere far out in the seven seas. Furthermore, such offenses are not usually discovered promptly. Ships are not equipped with the necessary legal staff to conduct general courts-martial, so the accused is ordinarily ordered back to the continental United States for trial. The witnesses are likely scattered all over the world, and some are usually out of the service by then.

The "bug" is that there is no power of subpoena or witness expense or mileage money available for "pretrial." So the "pretrial" fails in the type of case in which it is most needed. In most types of cases, however, the "pretrial" has proved its great practical value in actual experience, and has not been too great an administrative burden.

B. *Safeguards Operating During Trial by Court-Martial*

1. *Prohibition Against Unlawfully Influencing the Action of the Court.*

"Command influence" has been the root of the only real controversy raging around UCMJ in all its stages. Hotly debated during the drafting of the Code before it was presented to Congress, equally a heated subject before the Committees of Congress and of the American Bar Association, this asserted evil became the target of many key provisions of the new Code. Outstanding among all such provisions are the sweeping prohibitions carried by Article 37:

> "No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts."[30]

It would be disingenuous to pretend that the first sentence, with its broad proscription, did not work a major change in Navy pre-UCMJ practice as well as law. Training in military law[31] has traditionally been as basic to a naval officer's career as navigation or seamanship. Military law is considered one of the tools of discipline,[32] and discipline, in turn, one of the greatest responsibilities of command.[33] So, also, it is

30. 50 U.S.C.A. § 612 (1951).

31. As a general service line officer, not as a professional lawyer, is meant here, although selected officers were and still are sent by the Navy to university law schools for the full three-year law school courses.

32. "Discipline is considered to be that attribute of a military organization which enables it to function in a coordinated manner under different circumstances. Many factors contribute to the building of a well-disciplined organization. One of the instruments for achieving and maintaining a high state of discipline is military law." Atlantic Fleet Letter 16L-50, *supra* note 16.

33. "It is further considered that those in the military service primarily responsible for discipline are those in command. It is a primary command function. For this reason, all the factors contributing to the attainment of a high state of discipline should be controlled by and exercised by those in command with intelligent understanding. To do so requires a thorough knowledge of the tools available to do the job." Atlantic Fleet Letter 16L-50, *supra* note 16. "The Navy is composed of men. The success of the Navy is directly

traditional in the Navy that the senior in command has the duty of instructing and correcting officers junior to him in the line of command. This has heretofore been practiced in the field of naval justice as well as in other line duties.[34] For the benefit of the Navy, and hence the nation, this practice makes available to juniors the broader experience and more mature judgment of the seniors. No lawyer should shudder at this general principle, since it is certainly the practice in law firms for the senior partner to advise and, if necessary, criticise and correct his juniors.

Nevertheless, this system, which permitted reprimand and censure based on performance of judicial functions, was susceptible to abuse. In the judgment of the committees which drafted the new Code, and of Congress, it needed to be terminated. It constituted "command control." Although such censure or reprimand operated on court members and counsel only after the event, in the case of any particular accused it was regarded as a constant threat, capable of influencing the course of justice.

How has this provision worked out in actual practice? Did it stamp out this type of "command control"?

In more than four thousand cases reviewed in the Navy legal office on the experience of which this evaluation is made, in which there was the possibility of violation of the first sentence of Article 37, not one case of outright violation was found. In only three cases did the action or remarks of a convening or reviewing authority so closely approach censure or reprimand that it was necessary for the Comman-

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dependent upon how these men are impelled to perform their duties. The handling of the men, the guidance of men, is the primary function of the military commander. . . . Command will always actually be responsible for discipline whether it is so written or not. With this responsibility should go the necessary authority or there will be indecision and attempts to evade full responsibility with the resultant loss of spirit and effectiveness." *Discipline and Command*, Report to Chief of Naval Operations, dated 13 January 1950, by Rear Admiral Arleigh A. Burke, USN.

34. Article 0710, Navy Regulations, 1948, provides, *inter alia*, that: "The commanding officer shall: 1. Endeavor to increase the specialized and general professional knowledge of the personnel under his command by the frequent conduct of drills, classes, and instruction, and by the utilization of appropriate fleet and service schools. 2. Encourage and provide assistance and facilities to the personnel under his command who seek to further their education in professional or other subjects."

Such duties and responsibilities evolve from Article I, Articles for the Government of the Navy, that provided: "Commanders' duties of example and correction — The commanders of all fleets, squadrons, naval stations, and vessels belonging to the Navy, are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and any such commander who offends against this article shall be punished as a court-martial may direct. (R.S., sec. 1624, art. 1.)" It is interesting to note that, by § 7(c) of the Act of May 5, 1950, the salient provisions of this article were preserved to the Navy and may now be found set forth in Article 0792A, United States Navy Regulations, 1948, as amended.

dant to direct attention to Article 37. These cases occurred very shortly after the effective date of UCMJ.

In short, the proscription has proved to be clear enough, its scope broad enough, to stamp out the pre-UCMJ practice. And the sanction behind it is certainly severe enough. Any officer violating the provision would subject himself to court-martial and sacrifice his own career. It would be a clear violation also of Article 98(2).[35] The defenses of lack of knowledge or lack of intention, ordinarily available in Article 98(2) charges, could hardly be persuasive in such a case. So Congress and other agencies interested in military justice can stop worrying about this type of "command control."

The second sentence of Article 37 aims at attempts to unlawfully *influence* military courts and their members, and reviewing authorities as well. The first sentence of this Article operates to protect the accused during the trial, since the conduct of court members, counsel and law officer protected from post-trial command criticism or censure is their conduct during the trial.

There is no question that this second sentence of Article 37 is a clear, broad and adequately-sanctioned proscription of any unlawful attempts at unlawful influence by anyone in the armed forces. It does not appear, however, to have wrought any substantial change in either law or pre-UCMJ practice in the Navy. Even before UCMJ, attempts at unlawful influence would certainly have constituted court-martial offenses. Although it cannot be said that there were absolutely no such attempts at unlawful influence, certainly there was no such practice in general. This Code provision constitutes good insurance against such a practice ever arising. As in the case of the first sentence of the same article, Article 98(2) puts powerful teeth in this provision of law. In actual practice, the question of such an unlawful attempt at influencing the course of justice is known to have arisen in only one case in the scores of thousands handled in the Navy in the more than a year and a half since UCMJ took effect.[36]

2. *Other Types of Safeguards in UCMJ Trial Procedure.*

Articles 36 through 54[37] of the Code are all devoted to trial proce-

35. 50 U.S.C.A. § 692(2) (1951).

36. United States v. Galloway, Navy Department Board of Review Decision, October 8, 1952. "The Board feels that, because the intent of Congress as expressed in the Uniform Code of Military Justice was to prevent command control or influence over courts-martial, in a case where this question is raised, all doubts should be resolved in favor of the accused." United States v. Gordon (No. 258), 2 CMR 161 (U.S.C.M.A. 1952). The Board of Review concluded that "The evidence in the instant case discloses that the convening authority, by his actions prior to and during the trial, became an accuser and was without authority to convene the court-martial on rehearing. Article 23(b), UCMJ." For a general discussion of "command control" see also United States v. LaGrange and Clay (No. 313), 3 CMR 77, 79 (U.S.C.M.A. 1952).

37. 50 U.S.C.A. §§ 611-29 (1951).

dure. Although many of them are of utmost importance to "military due process," most of them are technical, none is a basis for major controversy, and all closely resemble long-established counterparts in the civilian administration of criminal law.

Of special interest in protecting the accused in military organizations is Article 38[38] which deals with the right of counsel, allows civilian counsel, if provided by the accused and sets forth the duties of all counsel who participate. So far as protecting the accused, however, Article 27[39] is much more important. It sets forth the professional qualifications for counsel, and makes mandatory equality of formal qualifications of defense counsel with trial counsel. Again, this is the type of UCMJ provision which cannot be proved in action by statistics, but which, from a knowledge of actual service conditions since the effective date of the new Code, should be considered substantially to have promoted the "justice element." Certainly it has worked substantial changes in pre-UCMJ Navy practice. Under the former system imposed by the Articles for the Government of the Navy, the judge advocate of the court not only handled the prosecution, but was the legal advisor to the court.[40] It was a perfectly logical practice, therefore, under such a law, if there was only one qualified lawyer available, to appoint him as judge advocate. Under UCMJ a general court-martial cannot be held unless there are at least three qualified lawyers available to serve as law officer,[41] defense counsel and trial counsel.[42] Now, however, for special courts-martial, which are very widely used throughout the naval service, if only one qualified lawyer is available, he must, as a result of Article 27, either be made a member of the court or defense counsel. The usual practice appears to be to utilize such a qualified lawyer on the court, generally as president, so that he can perform the "law officer" functions for the special court.

Article 41,[43] which provides the right of challenge, does present some problems unique to military services. By subsection (a), all members of a general or special court-martial and the law officer of a general may be challenged "for cause stated to the court." Subsection (b) gives to "each accused" and to the trial counsel one peremptory challenge. The law officer, however, is subject only to challenge for cause.

As it has worked out in actual practice, the peremptory challenge is quite frequently resorted to, but the challenge for cause is seldom

38. 50 U.S.C.A. § 613 (1951).
39. 50 U.S.C.A. § 591 (1951).
40. N.C. & B. §§ 350, 351, 400 (1937).
41. UCMJ art. 26, 50 U.S.C.A. § 590 (1951).
42. UCMJ art. 27(b), 50 U.S.C.A. § 591(b) (1951). Prior to UCMJ, there were no statutory requirements for legal-professional qualifications for any billets, even that of Judge Advocate General. As a matter of policy, however, about 240 qualified lawyers filled legal billets prior to the effective date of the new law.
43. 50 U.S.C.A. § 616 (1951).

invoked. There is no doubt that allowing the peremptory challenge imposes a burden of an administrative character on the service. The Code recognizes this in the case of the law officer and excludes him from such summary removal; but in many possible situations, especially in small commands, and in situations of wide deployment, permitting peremptory challenge of court members imposes a similar type of burden. It may be assumed, however, that Congress balanced this "military element" factor against the "justice element" factor. The fact that in actual practice the peremptory challenge is frequently invoked by the defense indicates that the accused or his counsel considers it a worth-while safeguard. It is therefore probably justified as a morale factor, even if its effect on the actual outcome of the trial is mostly imaginary. It must be conceded, however, that if it improves the feelings of the accused, it certainly operates to hurt the feelings of court members who are peremptorily challenged off the court. Many of them feel that there is an implication that they will not fulfill their oath to perform their duties faithfully.

C. *Safeguards Operating After Trial*

An inclusive consideration of safeguards provided the accused by UCMJ would, of course, include the entire review and appellate structure of the new system. That, however, is beyond the scope of this article. First, the actual experience on which this evaluation is based is at the field level, which, in the case of general courts-martial, includes only: (1) the initial review by the staff legal officer, and (2) action by the convening authority; and in the case of special and summary courts-martial: (1) the initial review, (2) supervisory authority review by the staff legal officer and (3) the action by the supervisory authority. The higher stages of appellate review are considered elsewhere in this Symposium, with comprehensive coverage of the Boards of Review[44] and the Court of Military Appeals.[45]

1. *Review of General Courts-Martial and Special Courts-Martial at Field Level.*

The Code provisions which govern court-martial review in the field sound prosaic, but actually provide spectacular protection for an accused. Article 60[46] requires that after every trial by court-martial the record be forwarded to the convening authority. Article 61[47] requires the convening authority to refer the record of every general court-martial to his staff judge advocate or legal officer, and requires the

44. See note 21 *supra.*
45. See note 21 *supra.*
46. 50 U.S.C.A. § 647 (1951).
47. 50 U.S.C.A. § 648 (1951). See note 51 *infra.*

legal officer to submit his written opinion thereon to the convening authority. Article 64 provides:

> "In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as *he finds correct in* law and *fact* and as he in his discretion determines should be approved."[48]

Article 65 provides:

> "(b) Where the sentence of a special court-martial as approved by the convening authority includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court-martial or directly to the appropriate Judge Advocate General to be reviewed by a board of review. If the sentence as approved by the officer exercising general court-martial jurisdiction includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a board of review."[49]

Together with these provisions of law must be read implementing provisions of the *Manual for Courts-Martial, United States, 1951,* which are approved by the President pursuant to UCMJ and have the force of law. To insure an independent legal review, paragraph 85a of the *Manual* requires that the convening authority refer court-martial records to the legal officer "before" acting on the record. Subsection (b) of the same paragraph specifies the mandatory contents of the legal officer's review. This written review must contain:

(1) a summary of the evidence in the case;

(2) his opinion as to the adequacy and *weight* of the evidence;

(3) his opinion as to the effect of any error or irregularity respecting the proceedings; and

(4) a specific recommendation as to the action to be taken.

It is also required that "reason for both the opinion and the recommendation" be stated.

The somewhat startling result of these rules governing review is that even before review reaches departmental level, the facts in each case have been tried, substantially *de novo,* no less than four times in special courts-martial involving bad-conduct discharges, and three times in general courts-martial cases. Of course, the facts are not reviewed at all in any case of "not guilty" findings,[50] so the result is

48. 50 U.S.C.A. § 651 (1951) (emphasis supplied).
49. 50 U.S.C.A. § 652 (1951).
50. 50 U. S. C. A. § 648 (1951).

that the accused is getting the benefit of having three or four independent "judges" of the facts.

The way field-level review has worked out in bad-conduct discharges special courts-martial cases in practice is this: *First,* the trial court hears and weighs the evidence; *second,* the convening authority weighs the evidence; *third,* the staff legal officer weighs the evidence; and *fourth,* the supervisory authority weighs the evidence. (Of course, each of these reviewing agencies reviews the law of the case as well, but in this respect there is no departure from civilian practice.) In a general court-martial case, *first,* the court weighs the evidence; *second,* the staff legal officer weighs the evidence; and *third,* the convening authority weighs the evidence.

This represents a radical departure from the pre-existing system in the Navy, under which reviewing authorities had the responsibility merely of determining whether there was any evidence, or any substantial evidence, to support the trial court's findings, in which case the findings were sustained.

Under the new system, the responsibility of the field reviewing agencies for weighing the facts is not substantially less than that of the trial court. Paragraph 87a (3), of the *Manual* makes this crystal clear, as follows:

> *"Sufficiency of the evidence.* In the course of taking action upon the record of trial, the convening authority is empowered to *weigh evidence,* judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. . . . *Unless he determines that a finding of guilty was established beyond a reasonable doubt* by the competent evidence of record, *he should disapprove the* finding." (Emphasis supplied.)

In the day-to-day operation of the new Code, staff legal officers are constantly confronted by this new type of safeguard for the accused, and the difference from the old system. The substance of this problem is comprehensively considered in four paragraphs in a Staff Legal Officer's Opinion rendered early in 1952:

> "The convening authority now is not only empowered, but is obligated, to substitute his own judgment on the facts for that of the court, if there has been a finding of guilty, and if he does not find that every essential element of the offense was established beyond a reasonable doubt in his own appraisal of the evidence. Under the old system, he could approve a finding of guilty if reasonable men could have so found. Now he can approve a finding of guilty *only* if *he himself* makes exactly the same finding, and is convinced thereof beyond any reasonable doubt. He may feel that the court is better equipped to make the finding, but that Congress wanted instead the personal determination of the convening authority is clear from the mandate of the law.
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> "Under UCMJ the review functions of the convening authority are not

> confined to those of a true appellate court, such as is the Court of Military Appeals, which by law can act 'only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as *incorrect in law* by the board of review.' Article 69(d), UCMJ. Although that Court may set aside the findings and sentence in a case on the ground of 'lack of sufficient evidence in the record to support the findings', its authority does not extend to *weighing* the evidence, and it cannot properly substitute its judgment on the weight of the evidence for that of the trial court. U. S. v. McCrary, 1 USCMA 1. The review by the convening authority, however, must, as shown above, extend to the facts, and to the *weight* of the evidence. This conclusion is reinforced by the provisions of law set out in the next two paragraphs.
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> "Before the convening authority undertakes to act on the record, he is required to refer it to his staff judge advocate or legal officer 'for review and advice'. This involves another independent weighing of the evidence, for paragraph 85b, MCM, 1951, provides that the staff legal officer's written review will include 'his opinion as to the adequacy and *weight* of the evidence.'
>
> "Here again the question is not whether the court's estimate of the weight of the evidence was reasonable, but whether in the personal opinion of the staff legal officer (*his* opinion) the weight of the evidence is such as to establish every essential element of the offense beyond a reasonable doubt."[51]

Does all this added review of the evidence and the weight thereof make any real difference in actual results, so far as the accused is concerned? Experience has demonstrated conclusively that it does.

This result is rendered inevitable by reason of the predominant type of serious case tried by courts-martial. Absence cases generally account for from between 80 and 90 per cent of the total number of cases tried before such military courts. These break down into the simple unauthorized absence cases, violations of Article 86,[52] and the much more serious type of absence offense, denounced by Article 85[53] as desertion. Other than a highly exotic type of deserton defined in subsection (3) of Article 85 which turns on enlistment in another armed force without disclosure, or enlistment in the armed service of a foreign power without authorization by the United States, desertion is merely unauthorized absence coupled with a specific intent. The vast bulk of cases fall under subsection (1), the intent there being, with respect to his organization or place of duty, "to remain away therefrom permanently." Practically all of the remainder are subsection (2) cases, where the intent is "to avoid hazardous duty or shirk important service."

The finding of such intent based on the weight of the evidence may swing the pointer of appropriate punishment through an arc of many

51. See UCMJ art. 61, 50 U.S.C.A. § 648 (1951). Also UCMJ art. 62, 50 U.S.C.A. § 649 (1951). See NCM 121, Dickson, 3 CMR 465 (1952).
52. 50 U.S.C.A. § 680 (1951).
53. 50 U.S.C.A. § 679 (1951).

years of confinement at hard labor, loss of rights of citizenship and veterans' benefits, dishonorable discharge and exclusion from opportunities of rehabilitation, or, in time of war, a death sentence.[54] With so much at stake on the finding as a fact of this pivotal factor of motivation and intent, invaluable additional protection is thrown around the accused by reviews in which additional independent appraisals of the weight of the evidence are authorized and mandatory.

Although it has been traditional in Anglo-American jurisprudence for centuries that "the Devil alone can try the thoughts of man," military courts have been trying practically nothing else in desertion cases for an equal length of time. Probably the only other type of tribunal in the United States devoting so large a part of its judicial time and so many volumes of decisions to similar "mind reading" is the National Labor Relations Board. An employer's conduct at the collective bargaining table is guilty or innocent depending upon whether or not his motivation meets the statutory standard of "good faith";[55] and an employer's conduct in discharging or laying off employees is innocent or guilty depending upon whether or not in doing so he was motivated by anti-union thoughts.[56]

In any event, actual experience has proved the value to the accused of having the facts re-weighed several times by authorities independent of, and up the chain of command from, the trial court. Many findings of intent to desert are set aside in the field-level reviews. The *Manual* enjoins the convening authority, in his weighing of the facts, to "recognize that the trial court saw and heard the witnesses." That factor, of course, is just what may have subconsciously prejudiced members of the trial court against particular types of accused persons. In desertion cases, the principal witness is generally the accused himself. Some accused persons have the misfortune to resemble the preconceived picture-image held by members of the court as to what a deserter or coward looks like; some also are confounded with the not too rare curse of talking in such a manner that they give the impression of lying even when telling the truth. Such unfortunates are obviously going to get a much more objective appraisal of their subjective intentions by a trier of the facts who does *not* "see and hear the witness." Defendants before civilian tribunals certainly do not enjoy the added protection of so many retrials of the facts.

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54. UCMJ art. 85(c), 50 U.S.C.A. § 689(c) (1951); Table of Maximum Punishments, MCM ¶ 127c, § A (1951).

55. See Ward, *The Mechanics of Collective Bargaining*, 53 HARV. L. REV. 754 (1940).

56. See Ward, *Discrimination Under the National Labor Relations Act*, 48 YALE L.J. 1152 (1939).

2. *Review of Summary Courts-Martial and Summary Courts-Martial Not Involving Bad-Conduct Discharges.*

The comparatively minor type of cases handled by summary courts-martial are certainly no higher than civilian police court level, and those handled by special courts-martial not involving bad-conduct discharges, are mostly on the police court level. Even for these cases, however, the new Code and *Manual* provide for an *automatic* and fact reweighing type of review, the like of which in civilian police court procedure would be revolutionary indeed. The UCMJ provision governing this type of review, Article 65(c),[57] provides that the records in such cases "shall be reviewed by a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Coast Guard or Treasury Department."

Implementing this statutory provision (and perhaps legislating a little to do so), subparagraph 94a(1), of the *Manual,* creates the concept of the "supervisory authority":

> "The officer immediately exercising general court-martial jurisdiction over a command and such other authority as may be designated by the Secretary of a Department have supervisory powers over special and summary courts-martial in such command."

Subparagraph 94a(2) provides that the supervisory authority will cause a law specialist to perform the review provided by Article 65(c), and then adds that:

> "The officer having supervisory authority may, in the interest of justice, set aside in whole or in part findings of guilty and the sentence, and thereupon restore any rights, privileges, and property affected by that part of the sentence set aside; he may mitigate or suspend any part or amount of the unexecuted portion of the sentence. . . .
>
> "When, upon review pursuant to this paragraph, the proceedings, findings, and sentence as approved by the convening authority have been *found correct in law and fact,* the proceedings shall be final in the sense of Articles 44 and 76." (Emphasis supplied)

It might have been supposed that the reviews thus provided would turn out to be rather perfunctory, routine or formalized affairs. Actual experience has proved to the contrary, however. The Navy law specialist has taken most seriously his statutory responsibility, and the supervisory authorities, who are mature and widely experienced line officers, are much interested in the type of offender involved in these cases, because they are all to be retained in the service. These additional safeguards for the accused have resulted in many convictions being set aside for errors of law, and hundreds of sentences mitigated in the interests of justice.

57. 50 U.S.C.A. § 652(c) (1951).

Here again the "justice element" in the new system of service justice has been expanded vastly over the comparable element in the civilian systems of criminal justice in police and minor courts. In no such courts can be found similar or equal systems of automatic review which include facts as well as law; indeed, there seldom exists any really practicable form of appeal as of right.

II. The Military Element

In evaluating the "military element"[58] of the Uniform Code of Military Justice, on the basis of the day-to-day workability as demonstrated in actual administration for a year and a half, this is the basic test: Has the Code successfully served the dual purposes of adequately sanctioning effective systems of government for the Army, Navy and Air Force, and of service as an efficient tool for the fashioning of that high state of discipline essential to maintaining these three great services as armed forces capable of "winning wars, not just fighting them"?[59]

To support orderly government and promote discipline, it is obvious that any system of military justice must (1) define offenses comprehensively enough, and in sufficient detail to cover not only those crimes common in civilian life, but also those offenses of a predominantly military nature; (2) set up a system of trying guilt of such offenses (court-martial system, including system of review), capable of effective operation in peace and war without obstructing the primary mission of the military service and without unduly burdening the administration of such service; and (3) impose a system of punishments adequate not only to punish the individual offender, but adequate also to deter the commission of offenses and promote discipline.

A. *UCMJ's Definition of Offenses*

More than eighteen months of actual operation under UCMJ has developed no substantial criticism of the adequacy of the new Code in defining offenses.[60] The Punitive Articles, running in number from 77 through 134, have met the acid test of governing the conduct of the several million persons who have served in the armed forces since the Code has been in operational effect. For those imagmative offenses not covered by some fifty-two specific punitive articles running the gamut from absence without leave to robbery, rape and murder, the broad

58. In a somewhat broader definition than given by Judge Brosman, *supra* note 9; see generally the "Introduction" to this article.
59. Commander in Chief, Atlantic Fleet, *supra* note 16.
60. The comprehensive survey conducted under direction of the Commander in Chief, Pacific Fleet, revealed none, *supra* note 2.

language of the General Article has provided sufficient coverage. Sample specifications presented in the *Manual for Courts-Martial* under this Article progress through the entire alphabet from the "A" of the well-known if somewhat unusual specification of "abusing a public animal" (this sample alleges that the accused "did wrongfully kick a public horse in the belly"), through many diverse and serious crimes such as perjury and negligent homicide, to the "W" of "wearing unauthorized insignia."

B. *UCMJ Courts-Martial System and Review Procedures*

1. *Setup and Operation of Navy Courts-Martial System under UCMJ.*

Because of the mandatory requirement in the case of general courts-martial for qualified lawyers to serve as law officer, defense counsel and trial counsel,[61] and an additional legal officer for the convening authority,[62] the Secretary of the Navy ordered into effect on 9 May 1951 a pooling system for making Navy law specialist officers available to staff such courts.[63] Under this setup, as stated in the Secretary's directive, "The great bulk of general courts-martial under the Uniform Code of Military Justice are handled by law specialists attached to the Headquarters Staffs of the various District Commandants." For units afloat and widely deployed throughout the world, central points for conducting general courts were established, and arrangements made to fly the Navy lawyers, when needed, to such points from the nearest commands having law specialists available.

This problem of meeting UCMJ requirements for qualified lawyers is very real to the Navy — many more difficulties are presented to a seagoing service than to those which are land-based. Ships and units of the Navy are widely deployed over 70 per cent of the earth's surface, even in times of alleged peace. Another factor, the Navy has proportionately fewer lawyers available for legal billets. The Army and Air Force each have approximately 1,200 officer attorneys, whereas there are only about 240 in the regular establishment of the Navy, and a number of about equal size of Naval Reserve Officer Attorneys now serving on active duty as such.

Consequently, much more than the Army and Air Force, the Navy relies heavily on the special court-martial, for which qualified attorneys are not mandatory, and which requires only three officer members.[64] Such courts can be conveniently convened by the captain or

61. UCMJ arts. 26, 27(b), 50 U.S.C.A. §§ 590, 591 (1951).
62. UCMJ art. 34(a), 50 U.S.C.A. § 605(a) (1951); and UCMJ art. 61, 50 U.S.C.A. § 648 (1951).
63. Secretary of the Navy Directive to All Ships and Stations, Subject: Implementation of the Uniform Code of Military Justice, dated 9 May 1951; published in Navy Department Bulletin 15 May 1951.
64. UCMJ art. 16(2), 50 U.S.C.A. § 576 (1951).

commanding officer of any reasonable size vessel, overseas shore station, or unit, from the officers under his own command. These tribunals presently have statutory power to adjudge punishments up to six months confinement at hard labor, bad-conduct discharge, and forfeiture of pay up to two-thirds pay per month, for not more than six months. With the special courts-martial exercising these powers, the UCMJ system of summary, special and general courts-martial has actually worked for the Navy, effectively trying offenses as defined in the new Code, and promoting orderly government and a high state of discipline.

Obviously, however, the system has to work as an integrated whole. In keeping with the directive of the *Manual*,[65] and the policy of the Navy, offenses are assigned to be tried by the lowest court which can assign an adequate punishment on conviction. Cases on the borderline between summarys and specials are tried by summarys, relieving the burden on that intermediate type of court. Similarly, many cases on the borderline between specials and generals are assigned to be tried by specials, thus relieving the burden on the few permanent general courts-martial which can efficiently be maintained in the naval establishment. Also, in many exigencies of the seagoing service, cases must be tried in places and at times when it is not practicable to have available all the personnel and law specialists necessary for a general court-martial. It's no answer to this problem to say, "Fly the accused to the nearest general court." There is also the little matter of flying there also all the necessary witnesses, and operating the initiating command in the meanwhile. Furthermore, it may be that discipline within the command will be better served by an on-the-spot trial. Then there is the cold fact that the existing general courts are operating at capacity now, and greater case loads will impose undue delays in trials.

Thus the system has been working, and is working better all the time.[66] Unfortunately, however, a difference of opinion has recently arisen between the Navy and the Coast Guard on the one hand, and the Army, Air Force and Court of Military Appeals on the other. The land and air services, and the Court of Military Appeals, want legislation to abolish the power of special courts-martial to award bad-

65. "Subject to jurisdictional limitations, charges against an accused, if tried at all, should be tried at a single trial by the lowest court that has the power to adjudge an appropriate and adequate punishment." MCM ¶ 33h (1951).

66. CINCPACFLT Survey, *supra* note 2, "Summary" — "Personal reactions in the Fleet concerning the Uniform Code of Military Justice when it became effective one year ago were decidedly negative. In six months time the feeling abated to the extent that in the main the Code itself was considered sound and workable but that the Manual needed drastic revision. The current opinion is that, generally, the concepts of the Manual are also basically sound and workable. The details are another matter. . . ."

conduct discharges.[67] The seagoing services are on record that such a step is not practicable for their organization and will seriously burden the entire system of trials and the operational efficiency of the services as military organizations. If this bad-conduct discharge power of special courts is abolished, literally thousands of cases now tried before such courts in the Navy each year must go to general courts-martial instead. Included would be all cases from the entire naval establishment in which an adequate punishment, in the event of a finding of guilty, would require imposition of a bad-conduct discharge.

The theory underlying the Army-Air Force-Court of Military Appeals move to abolish bad-conduct discharge powers in special courts-martial is that the exercise of such power has impaired the efficient administration of military justice. This impairment is said to fall into two categories:

> "Considerable expense to the United States not commensurate with the results obtained, and inadequate protection of the rights of both the United States and the accused at the trial level. Specific impediments to proper administration are; (1) Unavailability of and lack of requirement for legally trained personnel as court members or counsel . . . results in a high percentage of records replete with error requiring reversals, rehearings, proceedings in revision and other corrective action. . . . (2) The paucity of court reporters, particularly in overseas commands. This results in expensive time lags in the processing of cases. (3) Before special court-martial sentences involving bad-conduct discharges may be carried into execution the same appellate procedure required for general court-martial cases must be accomplished and in addition the action of another headquarters is involved. Since the maximum time of confinement which may be imposed by a special court-martial is six months . . . many accused have served their time and have been released from confinement before appellate review is complete. Thus many men under sentence of a punitive discharge are on a quasi-duty status; a situation which results in tremendous housekeeping and pay problems."[68]

Unfortunately, the theory underlying the position of the Navy and the Coast Guard is not stated in the "Joint Report of the United States Court of Military Appeals and the Judge Advocate General of the Armed Forces, May 31, 1951 to May 31, 1952," in which the recommendation is made to Congress. The strong probability is, however, that the Navy has persuasive answers to the three arguments set out in the Court of Military Appeals report.

The gist of argument number one is that absence of trained legal personnel on special courts has resulted in a "high percentage" of records replete with error, requiring reversals, and so forth. That may have been the Army and Air Force experience. It has not been the

67. "Joint Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces," May 31, 1951, to May 31, 1952.
68. *Id.* at 4-5.

case in the Navy. There is no reason to suppose that the 1,447 special court-martial cases reviewed in the Twelfth Naval District during the period 31 May 1951 through November, 1952[69] are not typical of those throughout the entire naval establishment and certainly less than one per cent could fairly be considered to have been "*replete* with error requiring reversal." Lest it be considered that the error was there, and just was not recognized in the supervisory review, the following statistics cover most of the same period, although they deal with special court-martial cases from the entire naval establishment involving a bad-conduct discharge reviewed by boards of review in the Navy Department from 1 July 1951 to 1 October 1952:

> "(a) Number of special courts-martial bad-conduct discharge cases approved on review below but reversed by a board of review or the Court of Military Appeals:
>
> (1) Findings disapproved in part — 154
>
> (2) All findings disapproved — 54
>
> "(b) Number of special court-martial bad-conduct discharge cases handled by boards of review in same period — 3,401"[70]

Thus the number of cases in which the findings were disapproved in whole or in part constitutes six per cent of the total cases reviewed. This figure becomes startingly significant when compared with results in the similar review for the same period of general court-martial cases, which were handled at the trial level by qualified lawyers certified as required by UCMJ:

> "(a) Number of general courts-martial cases approved on review below, but reversed by a board of review or the Court of Military Appeals:
>
> (1) Findings disapproved in part — 144
>
> (2) All findings disapproved — 40
>
> "(b) Number of general courts-martial cases handled by boards of review in same period — 3,019
>
> "The number of cases in which the findings were disapproved in whole or in part constitutes 5 per cent of the total cases reviewed. The corresponding percentage in case of special courts-martial cases as shown by the report of 13 October 1952, was 6 per cent."[71]

In short, these statistics indicate that after special courts-martial cases have undergone the series of thorough-going reviews at field level made mandatory by UCMJ and described *supra*,[72] the reversible

69. *Supra* note 4.

70. Report, Director, Military Law Division, Office of the Judge Advocate General, to the Judge Advocate General, Subject: Special Court-Martial Cases, dated 13 October 1952; JAG: I:2:DDC:vs.

71. Report, Director, Military Law Division, Office of the Judge Advocate General, to the Judge Advocate General, Subject: General Courts-Martial Cases, dated 29 October 1952: JAG:I:2:DDC:vs.

72. Part I of this article.

error percentage found in special courts-martial records exceeded the percentage of similar error in general courts-martial cases only by one per cent of the whole. Both of these types of trial courts, backed up by stringent reviews at the field level, appear to be batting close to 950, which is a pretty good average — especially when they are just learning to play the game under an entirely new set of rules. The better they get to know the new rules, the fewer will be the reversible errors, and the less persuasive the argument in favor of taking bad-conduct discharge powers from the special court-martial. Also militating against any possible argument that the interests of the accused are not sufficiently protected is the fact that no bad-conduct discharge sentence can be executed until the record has been reviewed and approved not only at field level, but also by a board of review, and the time for appeal to the Court of Military Appeals has expired.[73]

The Court of Military Appeals, Army, Air Force argument number two based on the "paucity of court reporters, particularly in overseas commands," must sound almost frivolous to civilians. The practical answer to that would be to hire more of them or train them from the personnel available. Unfortunately, the facts of military life are such that appropriations generally limit the total number of persons available on a money basis, so that for every one more court reporter hired, four fighting men cannot be hired. Furthermore, court reporting by hand or machine shorthand is a high skill requiring many years to perfect. Our armed forces do not keep them that long, generally, nor can they be spared for years of training.

Unlike the case of argument number one, the Navy does face the same problem stated in argument number two. There exists an acute shortage of qualified court reporters. The Navy, however, appears to have the answer to this one. After extensive experiments at the School of Naval Justice, Newport, R. I., and on ships at sea,[74] it has been established that available naval personnel with no prior training in court reporting can be trained to use the "steno-mask" electronic recording system of court recording in about two weeks. And the Navy is doing something about it. The Bureau of Naval Personnel has put out an instruction on the matter, and has established an actual training program for court reporters, using the new equipment.[75]

Argument number three actually does present a real problem, and

73. UCMJ art. 71(c), 50 U.S.C.A. § 658(c) (1951).

74. Tests were conducted at the School of Naval Justice, Newport, and on board a destroyer under way at sea on 28 April 1952. Because of the high noise level and radio interference problems, most types of electronic recording gear are not suitable. The type finally settled upon, however, is highly satisfactory, and has been in use for substantial periods in both general and special courts-martial in a number of naval activities. If it works for the Navy, it should even more easily work for the Army and Air Force, who have no shipboard complications to contend with.

75. Bureau of Naval Personnel Instruction 1510.8, dated 16 October 1952.

one common to all of the services. The review of all bad-conduct discharges special courts-martial at the departmental level and above, does take time. It results in burdensome delays. Of the three major services, the Navy is the least accustomed to such delays,[76] and meets the most difficult problems, because of the widespread deployment of its ships and units.[77] Congress, however, considered that the protection accorded the accused by such reviews was worth the time, effort and money it entails. It does not appear to be either a logical or a fair answer to give a man a general court-martial when the appropriate tribunal would otherwise have been the special court-martial, just because the length of time consumed in review after trial is the same in the two types of courts. It is certainly undesirable to have men sitting around in a quasi-duty status, having finished their sentence of confinement and presently merely awaiting appellate review of a bad-conduct discharge.[78] "Tremendous housekeeping and pay problems" do indeed result. But again it is neither fair nor logical to have all offenders who might possibly merit a bad-conduct discharge tried by general courts-martial, on the theory that since that tribunal has power to adjudge sentences of confinement longer than six months, the confinement in individual cases may be longer, thus cutting down the after-confinement-before-appellate-action time interval. Without doubt, those who advance the argument in question do not intend this implication; but the argument certainly does lead in that direction.

Summing up on these arguments and answers, it appears that the basis of the first argument, disproportionately high reversible error, does not exist in the Navy; so that this argument might support abolishing the use of bad-conduct discharge powers by special courts-martial in the Army and Air Force, but it loses validity when attempted to be applied to the Navy. As to the second argument, based on a shortage of court reporters, especially in overseas bases, the answer is probably the new type of court reporting being adopted by the Navy where trained shorthand reporters are not available. But the answer is not to give everybody who might deserve such a dis-

76. "Because Boards of Review were not utilized in the Navy prior to the establishment of the current system, it is also possible that greater time is now required in this service than heretofore, in the processing of court-martial records quite apart from the presence of our court. In other words, in the naval picture you've got two appellate agencies piled up on top. Of course, perhaps the Board of Review may dovetail a bit, or cover a bit, lap over a bit on the procedure, but you have virtually two new appellate agencies put into the picture." Judge Brosman, *supra* note 9.

77. The holding, pending completion of appellate review, of men who have been awarded bad-conduct discharges by courts-martial, but who have no sentence of confinement to serve, or who have completed such sentence, has been assigned as an additional function to Naval Receiving Stations in the Continental United States; they literally come from ships and units dispersed throughout the entire world.

78. Additional cogent considerations which accentuate the undesirability of this situation are presented in Part II, § B, subsec. 2, *infra*.

charge if found guilty a general instead of a special. Generals, as well as specials, require reporting, and the absolute volume of reporting will more likely be increased instead of diminished. Also, the taxpayers would probably appreciate making a few more court reporters available at overseas bases instead of transporting thousands of accuseds and more thousands of witnesses around at goverument expense. In the case of the third argument, a serious problem common to all the services does exist, but again the answer is not to give everybody who might merit a bad-conduct discharge a general court-martial. The answer is not to give sentences long enough to outlast the time interval now required to complete appellate review, but to cut down the time consumed by such review, or reach some other real solution to this problem.[79]

2. *Impact at Field Level of UCMJ Review Procedures.*

The review of the record of any trial takes time. When the review extends to weighing the evidence as well as considering errors of law, much more time is consumed. When review is automatic, and sentence cannot be executed until review is complete, every case requires a substantial period for review. It is easy to regard the time so consumed as "delay", and it may be suspected that it is generally so regarded throughout the services, particularly in the field. Actually it is instead a price paid, both by the individual concerned, and by the "military element" of the system of service justice, for a better product in the line of review, to enhance the "justice element" therein. As viewed by one of the judges of the Court of Military Appeals,

> "As I see it, the review system contemplated by the Code does not involve delay at all, for the very use of that term, implies waste or neglect. Moreover, by whatever the phenomenon is described, I personally regard it as in no sense serious, but rather as a modest and sanely balanced expenditure, for a result which is certain to involve some improvement in some slight degree at least, over pre-existing procedures."[80]

Regardless, however, of how reasonable is the price paid for the more elaborate and higher quality of review which Congress has decided upon as a "must" for the military services, the paying of that price has presented some substantial and highly practical problems.

As has been pointed out by the Judge Advocate General of the Navy,[81] the fundamental reason why the handling of the appellate time interval confronts the military with a serious problem not encountered

79. Suggested solutions are considered in Part II, § B, subsec. 2, *infra.*
80. Judge Brosman, *supra* note 9.
81. Address given before the Convention of the Judge Advocates Association, held in connection with the American Bar Association Convention, at San Francisco, 1952.

by the civilian system, is this: the civilians have a bail system, whereas the military do not. The services can take care of men on duty, and of men in confinement. They are not equipped, however, to take care of those who have served all of their confinement, but who can neither be restored to duty nor released to civilian life, because they have pending either a bad-conduct or a dishonorable discharge, which cannot be executed until appellate review is completed. As is pointed out by the Army, Air Force and Court in their joint argument that bad-conduct discharge powers should be abolished in special court-martial sentences,[82] the resulting housekeeping and pay problems are "tremendous." Actually, however, this is somewhat of an understatement, being only one side of the picture, and not all of that. In addition to housekeeping and pay problems, having large numbers of such men around in this purgatory type of status poses severe problems of discipline and morale for the commands concerned.

Actual experience at the Naval Receiving Station, Treasure Island, San Francisco, California, demonstrates that more than two-thirds of these people commit additional offenses during the period they are awaiting action on their discharges.[83] Moreover, their future in the Navy is, for ninety-five out of a hundred of them, behind them. They have no esprit, and their morale is correspondingly low. There are always about 150 of them around, and they are thus in sufficient numbers to affect the morale of others.

Looking at this picture from the side seen by these men themselves is perhaps even more depressing. If they are a nuisance to the Navy, and an expense to the taxpayer, they are a total loss to themselves during this period. In many cases, their enlistment has expired, with the result, according to a ruling of the Comptroller General, that they can draw no pay whatsoever.[84] Thus it appears to them that the Navy won't pay them, and neither will it let them go to work in civilian life. How the families of these men live is a mystery. Even leaving out of consideration their background (they would not be in such status if a court, a convening authority, a law specialist, and a supervisory authority had not agreed that they should be separated from the Navy with a bad-conduct discharge), it is small wonder that they commit additional offenses, particularly absence offenses. In extreme cases, this status may continue for many months, especially if they have short sentences and wish to appeal to the Court of Military Appeals; and it is nobody's "fault." The boards of review and Court of Military Ap-

82. Joint Report, *supra* note 67, at p. 5.

83. U. S. Naval Receiving Station, Treasure Island, reports that, between the period 1 January 1952 through 30 September 1952, out of 186 men being retained pending completion of appellate review, the following record of additional offenses was noted: two offenses — 104 men; three offenses — 43 men; four offenses — 18 men; five offenses — 21 men.

84. 17 Comp. Gen. 103.

peals are working as fast with their case loads as they can and still provide high quality reviews. In civil life, such persons would be out on bail.

Something should be done. The "justice element" is suffering. The "military element" is suffering. The taxpayers are suffering. The men are being made to be long-suffering. One practical answer would be to separate men having an unsuspended bad-conduct discharge immediately upon completion of their sentence of confinement or completion of review at the field level, giving them a sort of "interlocutory" bad-conduct discharge. This would relieve the armed force concerned from its discipline, morale, housekeeping and pay problems (and thereby spike the Army-Air Force third argument for abolition of special courts' discharge power).[85] It would relieve the taxpayers of the burden of supporting these men while in a nonduty status. It would permit the men to resume civilian life, and work to support themselves and their families.

The only question remaining is, what about those whom the boards of review or the Court of Military Appeals should subsequently find should not have been sentenced to a bad-conduct discharge? The answer is that they could be reinstated, perhaps with back pay,[86] if they should desire to return to the service. If they did not so choose, they could be awarded an appropriate type of administrative discharge to replace the "interlocutory" one. In the cases in which the trial court and field level review decisions were upheld — and these would cover more than 95 per cent of the cases, according to the statistics cited, permanent bad-conduct discharges could be issued. This solution would of course require a change in the present law, which does not permit execution of a bad-conduct or dishonorable discharge prior to completion of final appellate review.[87]

C. *Adequacy of Punishments Under UCMJ*

No question concerning a system of military justice could be more vital than whether the punishments provided have proven in actual experience to be just and adequate. Have they proved sufficient to support orderly systems of goverument in the armed forces and promoted a high state of discipline? The answers found in the first year and a half of experience under UCMJ are different for the two different types of punishment covered by the Code. This division is based on

85. Summarized in Part II, § B, subsec. 2, *supra.*

86. There are ample precedents for reinstatement with back pay in industrial employment under labor relations statutes, see 29 U.S.C.A. § 160(c) (1947), and cases cited therein, and in government employment, *e.g.*, loyalty procedures concerning civil service employees. (See Exec. Order No. 9835, 12 FED. REG. 1935 (1947).

87. UCMJ art. 71(c), 50 U.S.C.A. § 658(c) (1951), *supra* note 73.

the authority awarding the punishment. Under Article 15[88] commanding officers are authorized to impose "nonjudicial" punishment. This is the "mast" type of punishment, long familiar in the Navy. All other punishments are imposed by the three types of courts-martial, the two lower types, summary and special, being subjected to jurisdictional limits in the type and quantum of punishment they may award.[89]

1. *Adequacy of Punishments Awarded by Courts-Martial.*

The vast majority of the "Punitive Articles," which number from 77 to 134,[90] after defining the respective offenses, declare that the punishment shall be "as a court-martial may direct." Article 56, however, provides that: "The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense."[91] Pursuant to that Article, the President, in the *Manual for Courts-Martial, 1951,* prescribed a "Table of Maximum Punishments" which is Section A of paragraph 127c, of the *Manual,* and coupled with it a provision for "Permissible Additional Punishments," relating primarily to multiple offenders, which is Section B of paragraph 127c. These are the punishments which are considered in this section of this article. The evaluation of adequacy is taken in direct quotes but with the deletion of some material not directly relevant, from the results of the survey conducted by direction of the Commander-in-Chief, Pacific Fleet, which included detailed questionnaires to 94 ships in the Japan-Korea area, and visits to a total of 23 ships.

> "91 per cent of the commanding officers expressed the opinion that the authorized punishments by courts-martial are adequate when the ship is in WESTPAC (the Western-Pacific Area). This large percentage is due to Executive Order 10247 of 29 May 1951, which suspended the limitations of punishment for certain offenses committed in WESTPAC.
>
> "The favorable opinion as to adequacy of punishment is reversed when the ship is on the West Coast or at Pearl Harbor as a result of the limitations placed upon the punishment for unauthorized absence, particularly the short time absences. The Table of Maximum Punishments prescribes that where the absence is for not more than 60 days the accused may be sentenced to confinement at hard labor for not to exceed 3 days for each day or fraction of a day of absence and forfeiture of 2 days' pay for each such day of absence. Such a light sentence has been found not to be a deterrent to commission of the offense. When this factor is combined with the possibility or probability, depending upon the location of the ship, that brig space will not be available for execution of a sentence to confinement, some men are willing to buy a few days freedom with a court-martial.

88. 50 U.S.C.A. § 571 (1951).
89. UCMJ arts. 19, 20, 50 U.S.C.A. §§ 579, 580 (1951).
90. 50 U.S.C.A. §§ 671-728 (1951).
91. 50 U.S.C.A. § 637 (1951).

> "Related to this problem of adequate punishment for short time absences is the situation of a man surrendering from unauthorized absence at a place which is many miles from his duty station. Surrender at any regularly organized activity of the Armed Forces terminates the absence (Art. C-7802(2), BUPERS Manual) and places the man in jeopardy only of an inadequate sentence for the offense of unauthorized absence."[92]

The CINCPACFLT survey quoted above also considered the inadequacy of certain types of punishment, such as restriction for two months, which is an authorized court-martial punishment, in cases in which ships are on missions away from port, and all hands are in effect restricted. On the basis of the entire survey, the following recommendations were made, and concurred in by CINCPACFLT,[93] with respect to courts-martial punishments:

> "Authorize courts-martial to sentence a convicted accused to a deprivation of not to exceed 30 liberties in a three-month period if the accused is attached to a vessel which is outside the continental limits of the United States.
>
> "Authorize a punishment for the mere commission of the offense of unauthorized absence.
>
> "Unless there is unreasonable delay in executing a sentence, credit an accused who is sentenced to confinement by court-martial only with confinement actually served.
>
> "Authorize a convening authority who is a commanding officer of a ship to specify a reasonable future date for executing a court-martial sentence to restriction."

Although there has been no similar survey concerning experience of shore-based commands, or commands within the continental limits of the United States, there is substantial reason to believe that the consensus of informed opinion in such commands would be the same. The conviction that the prescribed maximum punishment for short absence offenses is entirely inadequate, is almost universally held.

A somewhat surprising twist to this situation is that the short-absence offenders themselves might benefit substantially if the punishment table allowance of confinement at hard labor should be increased. This is because paragraph 127c, section B, authorizes, as an extra additional punishment, a court-martial to adjudge a reduction to an inferior grade in the case of any enlisted person who is convicted by the court-martial. The practical result is that in many cases courts consider that for, say, a three-day unauthorized absence, nine days' confinement at hard labor is too little, and add to the sentence a reduction to the next inferior grade. On the other hand, if the same accused had

92. *Supra* note 2.

93. The letter cited *supra* note 2, signed by the Commander in Chief, U. S. Pacific Fleet, Admiral A. W. Radford, states that "CINCPACFLT concurs in the conclusions and recommendations of this study."

stayed over for ten days, the court might consider that 30 days confinement at hard labor would be an adequate punishment. This is unfair, for a sentence of nine days confinement, and a reduction in rating is a much more severe sentence in the long run, than the 30-day sentence, which was given for an offense of three times the duration. It frequently takes a man years to get his rate back in the Navy.

All-in-all, it appears that the UCMJ courts-martial sentences are substantially adequate to promote the "military element" in the justice system. The survey reveals only minor criticisms and problems, and the recommendations growing out of a prolonged period of actual experience are certainly not sweeping in character. Also, substantially all of them (except not giving credit for confinement except that actually served) could be put into effect without amending the Code itself. All that is needed are changes in the tables prescribed by the President for maximum punishments.

2. *Adequacy of Nonjudicial Punishments.*

Of all the changes wrought by the Uniform Code of Military Justice, the drastic cut imposed on the mast powers of commanding officers has hurt the Navy worst. It has hurt Navy discipline and morale. This is the opinion of the vast majority of the men who should know best — the officers charged with the tremendous responsibilities of command. Further, the opinion is based upon actual experience and not emotional bias. The loss of these powers has probably been felt even more keenly by shore-based units than those afloat, but the appraisal presented by the CINCPACFLT Survey based on the experience of ships' captains, set out below, was similar to a survey taken six months earlier, which was based on the experience of type commanders.[94] The following type commanders were in independent but unanimous agreement that "permissible punishments at mast are inadequate": Commander Cruisers and Destroyers, Pacific Fleet; Commander Aircraft, Pacific Fleet; Commander Amphibious Forces, Pacific Fleet; Commander 7th Fleet; Commander Naval Forces, Philippines; and Commander Service Forces, Pacific Fleet.

With some deletions necessary to bring the material within the scope of this article, the following material is quoted from the CINCPACFLT Survey, as representing the most authentic material available on the day-to-day operation of this important segment of UCMJ in actual practice, with particular reference to the "military element":

> "The non-judicial punishments which may be imposed upon enlisted personnel are not adequate. The authorized punishments are:

94. Appendix 1 to CINCPACFLT Report, cited *supra* note 2.

a. Withholding of privileges for two weeks.
b. Restriction for two weeks.
c. Extra duties for two hours per day for two weeks.
d. Reduction to next inferior grade. (This one is adequate).
e. If imposed upon a person attached to or embarked in a vessel, confinement for seven days.
f. If imposed upon a person attached to or embarked in a vessel, confinement on bread and water for three days.
g. Reprimand.

"Withholding of privileges and reprimand are very light sentences, constituting more of a warning to an individual than punishment or deterrent. Restriction is effective only if the period coincides with an in-port stay. Restriction at a foreign station is often ineffective. Extra duty is seldom effective. Confinement, whether or not on bread and water, is contingent upon availability of brig space and is insufficient in length to be a deterrent. Confinement is an excellent punishment which is not available to shore commands. The type commanders expressed similar opinions. . . .

"As a result of these inadequacies commanding officers have had to assign summary courts-martial in more instances than they did under AGN in order that an adequate sentence may be imposed. The awarding of additional summary courts-martial has caused more work and paperwork to be performed but without any appreciable benefits.

"Postponing the effective date of restriction or confinement until the ship arrives in port, or returns to port in the case of a ship which is about to sail, would make these punishments more effective. The Judge Advocate General has authorized such deferment for a reasonable time where the punishment is awarded while at sea. . . .

"As mentioned above, reduction in rate is an adequate punishment. However, the application of it is sometimes too severe. Related to this punishment is a recommendation that the commanding officer be authorized to impose a forfeiture. These are considered related since each has the common feature of touching the pocketbook. Where a man is reduced in grade it usually takes him a minimum of six months to requalify for his former grade. In order to have a lighter punishment commanding officers have recommended forfeiture in the following amounts:

a. Three days' pay.
b. $25 or 5 days' pay, whichever is greater.
c. Ten days' pay.
d. One-third of one months' pay.
e. One-half of one months' pay.

"There was included in the draft of UCMJ as submitted by the Department of Defense to the Congress an authorized punishment of

"If imposed by an officer exercising special court-martial jurisdiction, forfeiture of one-half of his pay for a period not exceeding one month." "The House Armed Services Committee deleted this provision, stating, that 'enlisted persons are in a far different pay status than officers, and we do not feel that a pay forfeiture is appropriate as punishment for disciplinary infractions by enlisted persons.' (H. Rept. 491—81st Cong. p. 6). The Committee's action was based on the recommendations of the three services, apparently on the ground that they did not favor 'forfeiting pay of enlisted men by arbitrary disciplinary action. We think that ought to be reserved for a court.' (House Hearings, p. 948). When the monetary

figures are reviewed this reasoning is not understood. For example, a petty officer second class who has four years' service receives $176.52 basic and sea pay whereas a third class receives $150.59, a difference of $25.93 per month. A reduction in rate followed by readvancement in six months constitutes a loss of $155.58 on just these two types of pay. Any one of the forfeitures recommended above would be a lighter punishment and would eliminate reduction and readvancement in appropriate cases. . . .

"On the affirmative side of the question of adequacy of non-judicial punishments are about one-fourth of the commanding officers. They have found a particular punishment or a series of punishments, which fact the crew knows and understands will be swift and which is effective for the particular ship. Many of the remaining three-quarters of the commanding officers have also utilized this system very effectively. But both groups desire amendments such as those recommended."

On the basis of this comprehensive study of the new diminished mast powers in actual operation, and on the basis of prior surveys showing the same undesirable results on Navy discipline and morale, the CINCPACFLT recommendations on UCMJ mast punishment powers are these:

"1. Amend Art. 15, UCMJ to provide, in addition to those presently authorized, non-judicial punishments upon enlisted personnel:

a. Forfeiture of one-half of one month's pay if imposed by an officer exercising special court-martial jurisdiction.
b. Ten days confinement in lieu of the present seven days.
c. Five days confinement on bread and water or diminished rations in lieu of the present three days.
d. Confinement of shore based personnel, especially foreign shore based personnel.
e. Extra duties for a period not to exceed four consecutive weeks.
f. Restriction of 30 days for personnel who are outside the continental limits of the United States, its territories and possessions.

"2. Authorize the commanding officer of a ship a reasonable latitude in setting the effective date for executing non-judicial punishments."

III. Conclusions

Actual experience has now conclusively proved that the Uniform Code of Military Justice works incredibly well for an entirely new system of justice. The "justice element" it establishes is vastly superior, in many ways, to the similar element in prior systems of military and naval justice. These improvements have been made in most cases without unduly or disproportionately weakening the "military element."

Safeguards thrown around the personnel of the armed forces of the United States are in many ways vastly superior to those available to

the average person brought before the criminal courts in civilian jurisdictions. This superiority is outstanding in the matter of automatic reviews, and in reviews which evaluate the weight of the evidence as well as consider errors of law.

"Command control" of military justice has been abolished under UCMJ. This fact has been made trebly clear — by the provisions of the Code itself; by the decisions of the all-civilian Court of Military Appeals; and by actual day-to-day experience in administration of the Code for more than a year and a half. Some, however, who long crusaded against "command control" of military justice, are apparently loath to acknowledge that enactment of the new Code constituted final and complete victory for that crusade. Crusaders, like mere human beings, hate to find themselves out of a job. They might, of course, reestablish contact with reality through these words of Judge Latimer, of the Court of Military Appeals:

> "if anyone now believes that a court-martial is merely an agency of the Commander, and governed solely by his whims, then he is too blind to see what has clearly been spelled out by members of Congress."[95]

Further amendment of the system established by the Code in an attempt to create an absolute guarantee against any possibility of "command control" of military justice, would bring the effort far past the point of diminishing returns. It would threaten to abolish also "command control" of discipline in the armed forces of the United States. Discipline is a function of command; and without the essential degree of discipline, the armed services could become a soft and hollow shell of a military force — without the heart, fortitude or will to win a third world war.

The CINCPACFLT Survey concludes that "The Uniform Code has not affected combat operations in Korea." Encouraging words, indeed. A more cumbersome code, however, could easily reduce military effectiveness. Any serious unbalance detracting from the "military element" of the Code to make fancied and unneeded "improvements" in the "justice element" would threaten to reduce to pitiful impotence the tremendous sacrifice being made by the people of the United States to secure the existence of the nation and the future of the free world.

Nor should there be unnecessary disturbance in the balanced system of three levels of courts-martial which with congressionally-approved bad-conduct discharge powers meets a practical and important need in the widely deployed fighting units of the Navy. This carefully-safe-

95. Commencement Address by Judge George W. Latimer at Charlottesville, Virginia, January 18, 1952, at pp. 1-2; quoted in Landman, *One Year of the Uniform Code of Military Justice; A Report on Progress*, 4 STAN. L. REV. 491, 508 (1952).

guarded power should not be abolished without cogent reasons.

It may be, of course, that no bad-conduct discharges should be awarded without a mandatory minimum sentence of confinement at hard labor for a year or more. Many scores of thousands of Americans have been drafted into the armed forces, or called back from the reserve and are serving involuntarily. It is unfair to those who are serving loyally and well under such circumstances to give a quick and easy ticket back to civilian life to those less loyal who may commit a series of petty offenses for that specific purpose. But this is part of the broad problem of equality of sacrifice, and is not susceptible of summary or fragmentary solution.[96]

In one way, and one way only, has actual experience demonstrated that the legislation[97] which embodies the Uniform Code of Military

96. Another part of this same problem is that of the homosexual, and those who profess to be. They also get a quick and easy ticket back to civilian life, and immunity from further service in the defense of the nation, through the medium of the administrative discharge of the "undesirable" type. No reason in justice appears for so excusing them from service, while imposing it upon men whose love-life is not perverted, and who have families to support and be separated from in military service. These people undoubtedly are undesirable in a military service, but to achieve anything like an approximation of equality of sacrifice of our young citizens in the defense of their country and their own freedom, some form of national service might be an alternative to giving them a "free ride" at the expense of all other citizens.

97. Of minor character, comparatively, and resulting from defective *implementation* rather than the legislation, but nevertheless of substantial importance to the Navy and the Navy's effectiveness as an instrument of national defense, is one other result of the impact of UCMJ upon the Navy's traditional "Captain's Mast." No change in the law would be necessary to obviate this probably unintended and certainly unfortunate result.

In cases of alleged offenses against law, regulations or orders, the traditional Navy practice has been for the Captain at Mast to inquire into the facts of the case, and examine the accused with respect thereto. Then it was traditional to save the man and his record from a trial by court-martial if there were any chance that a heart-to-heart talk, an admonition or a severe reprimand, plus some type of "mast punishment" would serve the dual purpose of maintenance of discipline and correction of the individual. This long successful system is in peril now, however, because of the uncertainty and confusion surrounding the definition of who is an "accuser" within the meaning of UCMJ art. 23(b), 50 U.S.C.A. § 587 (1951), which prohibits the commanding officer from convening a special court-martial to try an accused, if the commanding officer is an "accuser." In the ordinary and efficient course of business, the Captain cannot tell until he has held mast whether an offense might not be sufficiently serious as to require referral to a special court-martial. UCMJ art. 1(11), 50 U.S.C.A. § 551 (1951), defines an "accuser" as a "person who signs and swears to charges, who directs that charges nominally be signed and sworn by another, and any person who has an interest other than an official interest in the prosecution of the accused." The Manual's explanation of this definition does not add anything specific, MCM ¶ 5a(4), and thus far the decisions of the Court of Military Appeals have added little other than that the test is whether the convening authority "had a personal interest in the matter." United States v. Gordon (No. 258), 2 CMR 161 (U.S.C.M.A. 1951). Actual experience with this problem in the Pacific Fleet, as reported in the CINCPACFLT Survey, *supra* note 2, indicates that this uncertainty is driving a wedge between commanding officers and the men of their crews: "The questions and the troubles are on the distinction between 'other than an official interest in the prosecution' and 'merely official and in the strict line of duty.' In order that a commanding officer may direct an appropriate subordinate to investigate an alleged offense, which according to the Manual is within the rule, the commanding officer must know something

Justice has tended seriously to undermine the Navy's essential discipline, and hence its capacity to win wars such as may be fought for national survival in this age of atomic and hydrogen weapons. The cutting down past the danger point of the commanding officer's mast powers of administrative punishment is not a necessary part of the improved system of administration of military justice set up by the Code. Indeed, the new safeguard provided by UCMJ Article 15(d), which permits speedy and effective appeal from the commanding officer's awards at mast, so guarantees against abuse of this power that it could well have been increased, rather than decreased, without prejudicing the "justice element" of the Code.

The age-old wisdom of the sea has long established this axiom — the naval sea captain must be the personal embodiment of *direct* authority. It is not sufficient for him to be merely an indirect representative of *remote* authority. The safety of all hands, of the ship, and of the country which must depend upon its fighting ships for national security, may at any time hinge upon discipline and upon unquestioning, habit-instilled obedience to the commands of the Captain.

The relationship between Captain and crew must be a very personal thing. If, through lack of reasonable sanctions sufficient to back up his orders and commands, he has to refer substantially every minor offense to a court-martial, he loses one of the great opportunities and responsibilities of leadership — that of correcting in a paternal fashion any incipient erring tendency of his own men. By careful and mature consideration of their individual problems, the Captain can exert the minor punishments of mast so as to cut short any potential disregard for the obligations of duty which, if allowed to develop, might other-

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about the alleged offense, who committed it and its general nature. May he listen to the stories of the suspect and the witnesses without becoming an accuser? May he ask the witnesses any questions? May he if he advises the suspect about rights against self-incrimination and of remaining silent, ask questions of the suspect? If the wording and supposed spirit of the law is followed, the answers to these questions are affirmative since the commanding officer has only an official interest in the matter. Doubt is cast upon this interpretation by . . . the Manual for Courts-Material, since it gives only one example of a commander not becoming the accuser and that is the extreme one of the commanding officer requiring a subordinate to do the investigating (questioning of the witnesses and suspect).

"As a result of these rules commanding officers are not willing to, and often cannot hold mast as they did under AGN until a preliminary inquiry is made and charge sheet or modification thereof has been prepared. If the case is disposed of by awarding non-judicial punishment, much unnecessary time-consuming work has been done. Some commanding officers no longer hold mast if a court-martial is awarded. One commanding officer expressed himself on this point: 'I feel that the weakest part of the UCMJ is the depriving the Commanding Officer of making a preliminary inquiry at Mast into the alleged offense and of interrogating the accused himself. I know of many instances of wise and just Commanding Officers salvaging a man at mast who would otherwise never have come around if he had gotten a court-martial. Under the present system the personal touch and the opportunity to exercise a golden opportunity of leadership is gone. The Captain is merely the vengeful arm of wrathful justice.'"

wise drag down a career of potential value to the Navy and to the man himself. Because the corrective sanctions of mast are administrative rather than judicial, this can be done without besmirching a man's record with "convictions." With mast powers restored, commanding officers may again save many more men — for the men themselves and for the Navy.

Had there been a long history of abuse of mast powers in the Navy, or even any substantial evidence of such a thing, emasculation of such powers might have been warranted. None has been shown. There is, of course, always a possibility that *individuals* might abuse such power. But now there is a statutory method of appeal provided to meet that possibility. In any event, legislating against such a remote possibility, by cutting off the powers, is like taking from American parents the power to go beyond words of admonition in correcting their children. There is always the possibility that some individual parents will abuse their authority to cut down Junior's allowance, or administer a spanking or send him to bed without his full supper. As yet, however, there has been no great move to abolish these parental powers and require Dad to refer all such matters to a juvenile court for any corrective measures more effective than reproachful words. The full mast powers formerly existing under the Articles for the Government of the Navy were no more, in proportion to the greater age of the boys to be handled, and to the moment to the individual and to the Navy of the correction to be accomplished, than this type of parental authority in the American home. Those powers need to be restored.

Aside from that single major weakness, which has nothing to do with the great merit of the system of service justice provided by the new Code, it is clear that those who so well drafted the provisions of UCMJ, and the Congress which improved it and made it the law of the land, performed great service for their country in a time of urgent need.

A ruthless and treacherous enemy may steal the secret of our weapons, and unleash them in an egomaniacal attempt to enslave all of mankind. Communists neither could nor would, however, copy a system of military justice which not only supplies those sanctions essential to winning discipline, but also recognizes and protects the dignity and freedom from oppressive action of the individual fighting man. This tradition of justice is the foundation of the American way of life. It gives our fighting men something worth fighting for — and something they can understand. As an instrument for winning a final victory, it may prove more potent than any material weapons of destruction.